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In The

Supreme Court of the United States

October Term, 1995

BRENDA TUCKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ of Certiorari
To The United States Court of Appeals
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals for the Sixth Circuit was in error when it determined that no outrageous conduct due process defense exists to protect the citizens of the United States from overzealous investigatory conduct which creates crimes where none would have been committed absent government intervention?

2. Whether the Court of Appeals for the Sixth Circuit was in error when it determined that no outrageous conduct due process defense should exist to protect the citizens of the United States from overzealous investigatory conduct which creates crimes where none would have been committed absent government intervention?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW. i

TABLE OF CONTENTS. ii

TABLE OF AUTHORITIES. iv

PETITION FOR WRIT OF CERTIORARI. 1

OPINION BELOW. 1

JURISDICTION. 1

STATEMENT OF THE CASE. 2

REASONS RELIED UPON FOR GRANTING THE WRIT OF CERTIORARI. 11

1. The Court of Appeals for the Sixth Circuit erred when it determined that no outrageous conduct due process defense exists to protect United States citizens from overzealous investigatory tactics which create crimes where none would have been committed absent government intervention. 11

2. The Court of Appeals for the Sixth Circuit erred when it determined that no outrageous conduct due process defense should exist to protect United States citizens from overzealous investigatory tactics which create crimes where none would have been committed absent government intervention. 22

CONCLUSION. 29

APPENDIX A, *United States v. Tucker*, ___ F.3d ___, No. 93-6026 (6th Cir. 1994). 1a

APPENDIX B, Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc. 1b

APPENDIX C, Magistrates Report. 1c

APPENDIX D, Order of the District Court. 1d

APPENDIX E, Excerpt from District Court Transcript, pp.5-8. .1e

APPENDIX F, *United States v. Solorio*, 1994 WL 509047 (9th Cir. 1994). 1f

TABLE OF AUTHORITIES

CASES

Hampton v. United States, 425 U.S. 484 (1976). 12,13,16,22,23

Sherman v. United States, 356 U.S. 369 (1958). 19

United States v. Barger, 931 F.2d 359 (6th Cir. 1991). 5,6,7,8,16,20

United States v. Beverly, 723 F.2d 11 (3d Cir. 1983). 18

United States v. Bogart, 783 F.2d 1428 (9th Cir.) *vacated in part on other grounds sub nom. United States v. Wingender*, 790 F.2d 802 (9th Cir. 1986). 15,17,18

United States v. Chin, 934 F.2d 393 (2d Cir. 1991). 16

United States v. Davis, 15 F.3d 1393 (7th Cir. 1994). 16

United States v. Gardner, 658 F.Supp 1573 (W.D. Penn. 1987). .18

United States v. Gillespie, 321 F.2d 518 (6th Cir. 1963). 20

United States v. Gonzalez, 927 F.2d 139 (3d Cir. 1991). 16

United States v. Huff, 959 F.2d 731 (8th Cir. 1992). 21

United States v. Kummer, 15 F.3d 1455 (8th Cir. 1994). 17,21

United States v. Lard, 734 F.2d 1290 (8th Cir. 1984). . . 15,17,23,24

United States v. Michael, 17 F.3d 1383 (11th Cir. 1994). 17

United States v. Mosely, 965 F.2d 905 (10th Cir. 1992). 17

United States v. Nicely, 922 F.2d 850 (D.C. Cir. 1991). 18,21

United States v. Osborne, 935 F.2d 32 (4th Cir. 1991). 16

United States v. Russell, 411 U.S. 423 (1973). 12,17,22,24

United States v. Santana, 6 F.3d 1 (1st Cir. 1993). 13,15,16,18,23,26

United States v. Smith, 7 F.3d 1164 (5th Cir. 1993). 16

United States v. Solorio, 1994 WL 509047
(9th Cir. 1994). 13,14,17,18,24,25,28

United States v. Tucker, --- F.3d ---, No. 93-6026
(6th Cir. 1994). 9,10,11,15,18,20,26,27

United States v. Twigg, 588 F.2d 373 (3d Cir. 1978). 13,18

MISCELLANEOUS

Kent Greenawalt, *Reflections on Holding and Dictum*, 39 J.LEGAL EDUC., 431 (1989). 21

Black's Law Dictionary. 20

United States v. Simpson: 'Outrageousness!' What Does It Really Mean? -- An examination of the Outrageous Conduct Defense, 18 SW. U.L. REV. 105 (1988). 12

PETITION FOR WRIT OF CERTIORARI

The petitioner, Brenda Tucker, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, which denied the timely petition for rehearing in this matter and suggestion for rehearing en banc on August 26, 1994.

OPINION BELOW

On July 15, 1994, the United States Court of Appeals for the Sixth Circuit reversed the district court's ruling affirming the magistrate's recommendation for dismissal of the indictment due to the outrageous conduct of the government in inducing the defendant to violate the law. The decision of the Sixth Circuit is included with this petition as Appendix A. The Petitioner's timely Petition for Rehearing En Banc pursuant to Fed. R. App. P. 40, and Suggestion for Rehearing En Banc pursuant to Fed. R. App. P. 35 were denied on August 26, 1994. A copy of the Order denying the Petition for Rehearing in the Court of Appeals is included as Appendix B.

JURISDICTION

The order of the Court of Appeals for the Sixth Circuit denying Ms. Tucker's Petition for Rehearing was entered on August 26, 1994. Appendix B. This Petition for Writ of Certiorari is filed within ninety days of that date, pursuant to Supreme Court Rule 13.4. The jurisdiction of this Court is invoked under 28 U.S.C §1254(1).

STATEMENT OF THE CASE

The following pertinent facts are found in the magistrate judge's report of April 6, 1993, which were adopted by the district court in its oral ruling of May 28, 1993. See Appendix C, Magistrate's Report.

Brenda Tucker was indicted on September 22, 1992, by the federal grand jury for the Western District of Tennessee for violations of 7 U.S.C. § 2024(b)(1) and 18 U.S.C. § 2. The grand jury returned a superseding indictment on February 16, 1993, charging Brenda Tucker with purchasing, and aiding and abetting in the purchase of food stamps at less than face value in violation of the aforementioned provisions. Ms. Tucker filed a motion to dismiss the indictment due to the outrageous conduct of the government in inducing her to purchase the stamps. United States Magistrate Judge Aaron Brown held evidentiary hearings on the motion and accordingly recommended dismissal of the indictments on April 6, 1993. Notwithstanding the filing of the government's exceptions to this recommendation, United States District Court Judge Jerome Turner adopted the Magistrate's report and dismissed the indictment on June 3, 1993. See Appendix D.

The United States filed a notice of appeal on June 30, 1993, and the Sixth Circuit reversed the district court's dismissal on July 15, 1994, and remanded the matter for trial. Ms. Tucker's timely petition for Rehearing pursuant to Fed. R. App. P. 40, and Suggestion for Rehearing En Banc pursuant to Fed. R. App. P. 35 were denied on August 26, 1994. Appendix B.

Pertinent facts:

Linda Hancock was hired by Clifford White, an agent of the United States Department of Agriculture, as an undercover operative to sell food stamps. White furnished Hancock with food stamps issued by the Department of Agriculture and instructed

Hancock to sell them. For this service, Hancock was paid 50 cents for each dollar's worth of food stamps she was able to sell. She was also paid mileage for her vehicle regardless of whether she made any sales. She was given no supervision and no instructions regarding the targeting of potential buyers, and White in fact told her that he "[didn't] care who you sell them to, if you think you know of anybody that will buy them at 50/50."

The petitioner, Brenda Tucker, owned and operated a beauty salon in Memphis. Hancock was Ms. Tucker's former next-door neighbor of approximately eight years, whom Ms. Tucker also considered a personal friend. Ms. Tucker and Hancock continued their friendship after they were no longer neighbors. In fact, Hancock periodically consulted Ms. Tucker regarding her personal problems, including work difficulties, health problems, and even extremely personal marital problems which ended in divorce. Ms. Tucker often gave Hancock advice, or just listened to her. Ms. Tucker could empathize with many of Hancock's difficulties since Ms. Tucker, too, was a victim of divorce and was aware of the stress of trying to raise children alone with no support. Ms. Tucker was aware that due to all of Hancock's problems, Hancock was in distress. As a result, Ms. Tucker made a special effort to be sympathetic with Ms. Hancock.

Tucker had never purchased food stamps before, and her only criminal history was a shoplifting conviction seventeen years prior to the November 1990 incident.

In November of 1990, Hancock contacted Tucker by telephone at the beauty salon and asked if she, Tucker, wanted to buy some food stamps. Ms. Tucker told Ms. Hancock that she did not buy food stamps and did not want any. Hancock then told Ms. Tucker that she had financial problems and wanted some money to pay her light bill, and asked Tucker if she knew of anyone else who might purchase the stamps, but Tucker did not. Ms. Tucker assumed that the stamps which Hancock was

attempting to sell belonged to Hancock, and she further did not know that purchasing food stamps was illegal.

Prior to November 16, 1990, Hancock called Tucker several times at her business and at home concerning the purchase of food stamps. Ms. Tucker told Hancock on each occasion she was uninterested and refused to purchase any stamps. Hancock continued to tell Tucker that she was having financial problems and needed assistance paying her utility bill. Finally, after many calls and pleas, Ms. Tucker relented and stated, "Well, okay, bring them." Ms. Tucker then bought food stamps on November 16, 1993.

Shortly after the November 16, 1990 purchase, Hancock told Tucker that at the time she, Hancock, was in dire financial straits, and she would be unable to provide her children with a proper Christmas. Ms. Tucker told Hancock that she was not interested in any food stamps. A second time, Hancock visited the salon soliciting food stamps, and Tucker again refused, stating that she did not have the cash which Hancock required. Hancock insisted that Ms. Tucker send one of her workers to cash a check so that Tucker would be able to purchase the stamps. Ms. Tucker relented because she felt sorry for Hancock's children who were friends of her children. Ms. Tucker also felt badly for Hancock because she knew that Hancock's husband mistreated her. Ms. Tucker simply wanted to help Hancock.

After examining this evidence, the magistrate judge concluded that Hancock played upon Tucker's sympathy in order to induce her to purchase food stamps. Specifically, Magistrate Judge Aaron Brown stated:

> Ms. Hancock picked Ms. Tucker out because Ms. Tucker was a personal friend. There is no indication that . . . Ms. Tucker [was] even contemplating the purchase of food stamps prior to Ms. Hancock's arrival. Ms. Hancock came, with

> her tales of woe, and induced [Tucker] to buy the stamps. See Appendix C.

The magistrate judge considered the four factors in *United States v. Barger*, 931 F.2d 359 (6th Cir. 1991), for determination of whether governmental conduct is so outrageous as to constitute a violation of the Due Process Clause of the Fifth Amendment. He then applied his factual findings to the following criteria of *Barger*:

> (1) The need for police conduct as shown by the type of criminal activity involved, (2) the impetus for the scheme or whether the criminal enterprise pre-existed the police involvement, (3) the control the government exerted over the criminal enterprise, and (4) the impact of the police activity on the commission of the crime.

Barger, 931 F.2d at 363.

With respect to the need for the police conduct in light of the particular criminal activity, the magistrate judge made the following factual findings in his report:

> The record is totally devoid of any evidence establishing a need for the government to send Ms. Hancock to sell food stamps to her friends and acquaintances and thus create crimes. There is no evidence, or indication, that Ms. Tucker . . . ever bought any food stamps or engaged in any illegal activity remotely similar to that. Appendix C.

Although Hancock testified that her knowledge of Ms. Tucker's previous shoplifting conviction in the early 1970's led her to believe that Ms. Tucker might be inclined to buy food stamps, the magistrate judge stated in his report that Hancock had no information "concerning a propensity on the part of Ms. Tucker . . . to purchase food stamps or that [Tucker] engaged in such activity in the past." Appendix C.

The district court also distinguished the need for police

activity in *Barger*, which involved the infiltration of a government agent in a Hell's Angel motorcycle group, from the need in the present case:

> In the *Barger*[1] case much more serious ramifications of criminal conduct were expected by the government with good cause. And it was reasonable to believe that those people who were being interacted with undercover were dangerous and might respond in injurious and even murderous ways. In this case, given the record that was presented to the Magistrate and as he found those facts to be, there is simply no evidence that these people were suspected of having been involved in any trafficking. There were just ordinary people who were approached by a confidential informant working on a contingency fee basis that was a friend . . . who used sympathetic ruses, . . . about her health and her children. See Appendix E, Excerpt from District Court Transcript.

The magistrate judge next considered the second *Barger* factor, namely "the impetus for the scheme or whether the criminal enterprise pre-existed the police involvement," and he found:

> The impetus for the scheme appears simply to have been a desire by the government to lure anyone into committing the crime of buying food stamps. Neither Ms. Tucker nor [her co-defendant] were engaged in any criminal enterprise prior to being approached by Linda Hancock. See

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[1] The transcript of the May 29, 1993 report date erroneously reads "Barter." See Appendix E.

Appendix C.

The district judge also commented on the impetus factor in light of the controlling facts and *Barger*:

> [T]he totality of those facts reflect a shocking invasion, in my view, by a hired confidential informant who was working for the government apparently on a contingency fee basis, as determined by the Magistrate, who elected by the freedom given her by her case agent to delve into the private lives of ordinary people who were not otherwise suspected of any wrong doing. And while I recognize that the police and investigative agencies have to have great leeway to investigate crime and to go under cover, I do not think that the kind of investigatory conduct that took place in this case is acceptable conduct under the due process clause. . . . I don't think we are at a point in our criminal history where the government needs to lower itself into targeting sympathetic ploys on citizens that are not otherwise suspected of engaging in criminal conduct, particularly when some of the conduct that the Magistrate found to be true was used in these sympathetic ploys. See Appendix E.

The magistrate judge then commented on the control element of *Barger*:

> The government exercised compete control over this crime. Ms. Hancock picked Ms. Tucker out because Ms. Tucker was a personal friend. . . . There is no indication that [Ms. Tucker was] even contemplating the purchase of food stamps prior to Ms. Hancock's arrival. Ms. Hancock came, with her

> tales of woe, and induced [Tucker] to buy the stamps. Ms. Hancock delivered them and received a cut of the proceeds for inducing her friend . . . to commit crimes. See Appendix C.

The district court likewise found:

> The confidential agent went to a . . . former neighbor and friend. She used sympathetic reasons of ill health and deprived children. And she alone initiated the opportunity for this crime to occur and initiated it through ruses and with those friends, who I point out again with some emphasis, were people that were not suspected by the government of having been involved in criminal trafficking for food stamps. See Appendix E.

With respect to the fourth *Barger* factor, the impact of the police activity on the commission of the crime, the magistrate judge said that it was

> intricately related to the third factor. It was Ms. Hancock's activity on behalf of the Department of Agriculture that brought about the commission of the crime. There is no indication that the crimes would have been committed but for Ms. Hancock's activities. See Appendix C.

The magistrate judge noted that courts have permitted an outrageous conduct/due process defense even though a defendant's conduct would preclude an entrapment defense. He concluded:

> I believe that this case is one that should be dismissed without regard to the defendant's ability to mount an entrapment defense. We are not dealing with an effort by a government agent to trap someone he suspected of committing a crime. What we have instead is a government agent hiring

> a person, on a percentage contract, to go out and induce anyone she chose, including personal friends, to violate the law. I believe this conduct goes far beyond the bounds of propriety and should not be countenanced. See Appendix C.

The district court recognized the seriousness of the food stamp offense and the need for legitimate law enforcement techniques, but agreed with the magistrate judge that this offense

> . . . is nothing like the offense and the possibility of injury that was involved in *Barger*. It is not such a terrible offense that the government, in my view, should be permitted to use agents under the totality of the facts in this case. . . . It is the totality of the facts in this case that have convinced me that the conduct has gone beyond the due process limitations. . . . [W]hen [law enforcement techniques] are employed in totality with people who are not otherwise suspected of engaging in crime, it seems to me that the conduct, as the Magistrate concluded, crosses that boundary. See Appendix D.

The district court then advised counsel that its remarks could be used as the court's opinion in this case. See Appendix D.

On appeal, rather than determining whether the government's undercover tactics crossed the line from inventive thorough investigation to outrageous opprobrious conduct, the Sixth Circuit Court of Appeals held that the defense of outrageous government conduct is not available to the petitioner, and thus rejected "as a matter of law the theory upon which defendants based their motion to dismiss without regard to the particular facts of their case and without reaching the issue of whether or not those facts can properly be characterized as 'outrageous'". See Appendix A, *United States v. Tucker*, ___ F.3d___, No. 93-6026

(6th Cir. 1994).

The court found no authority, Supreme Court, Sixth Circuit, or otherwise which would require it to recognize such a defense, save one Third Circuit decision, which has since allegedly been disavowed by the Third Circuit. See Appendix A, *Id.* at 11. Numerous references to the defense in Supreme Court, Sixth Circuit, and other appellate court decisions were simply dicta because, although the courts examined the doctrine of outrageous conduct, and applied accepted criteria to the facts of each case to determine whether the defense could be successfully asserted, none of the facts of these cases rose to the level of outrageous conduct, and the defense was rejected accordingly. *Id.* at 8-14. While devoting the bulk of the opinion to elaborately detailing why all these inconsistent decisions were merely dicta, the court briefly recited three reasons why such a defense should not be recognized:

> (1) government conduct which induces a defendant to commit a crime, even if labelled "outrageous," does not violate that defendant's constitutional right of due process; (2) the district court lacked authority to dismiss the indictment for governmental misconduct where no violation of an independent constitutional right has been shown; and (3) continued recognition of this "defense" stands as an invitation to violate the constitutional separation of powers, intruding not only on the province of the Executive Branch but the Legislative Branch as well.

Id. at 14.

The Sixth Circuit thus reversed the district court's dismissal of the indictment and remanded the case for trial.

Boyce F. Martin, Circuit Judge, filed a concurring opinion in which he stated that he could not agree with the majority's

characterization of some two dozen Sixth Circuit cases which addressed and ruled on the doctrine of outrageous conduct as dicta. However, he concurred in the result because he did not believe that the government's conduct rose to the level of outrageous. *Id.* at 20-21.

REASONS RELIED UPON FOR GRANTING A WRIT OF CERTIORARI

1. **The Court of Appeals for the Sixth Circuit erred when it determined that no outrageous conduct due process defense exists to protect United States citizens from overzealous investigatory tactics which create crimes where none would have been committed absent government intervention.**

Supreme Court Rule 10.1(a) provides that this Court may grant a writ of certiorari "[w]hen a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter;"

The decision of the United States Court of Appeals for the Sixth Circuit in *United States v. Tucker* which held that no outrageous conduct due process defense exists is in direct conflict with Third and Ninth circuit authority. Further, the decision is, at least, in apparent conflict with all other circuits including previous Sixth circuit precedent. The decision is a dangerous aberration, which, if left unchallenged may succeed in abolishing, in at least the Sixth Circuit, a doctrine which has been developing for the last twenty years, and is necessary to insure that people are not punished for crimes which the government creates.

The genesis of this doctrine in the Supreme Court can be found in the 1973 decision of *United States v. Russell*, 411 U.S. 423

(1973), where a majority of the Supreme Court approved the subjective view of entrapment, whereby the conduct of the particular defendant is examined for evidence of any predisposition toward committing the crime at hand. Such predisposition will preclude successful assertion of an entrapment defense. The Court rejected an objective approach to entrapment, which would focus, not on the defendant's conduct, but instead, on "whether the police conduct revealed in the particular case falls below standards to which common feelings respond, for the proper use of governmental power." *Russell*, 411 U.S. at 440-41 (Stewart, J. dissenting). However, the Court left the door open for the existence of such an objective theory founded in due process concerns of fundamental fairness, which would focus on the outrageous conduct of the government, when it stated that the Court "may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction."[2]

In *Hampton v. United States*, five Justices appeared to agree that even if a defendant was predisposed to commit a certain crime, the conduct of the government might reach a "demonstrable level of outrageousness" meriting a bar of a

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[2] Although the outrageous conduct doctrine is often confused with or described as an objective entrapment approach, the two actually are quite different theories. The outrageous conduct defense focuses on whether the government has violated the defendant's due process rights with, for instance, their aggressive detective processes, and thus turns on whether the government has acted unconstitutionally. Entrapment, on the other hand, is a common law defense which focuses on whether the defendant had a predisposition to commit a certain crime, regardless of the tactics employed by the government in its investigation. Entrapment does not derive its power from the constitution. See *United States v. Simpson: 'Outrageousness!' What Does It Really Mean?--An Examination of the Outrageous Conduct Defense*, 18 SW. U.L. REV. 105 (1988).

conviction for due process reasons.[3] Although Hampton lost the case due to predisposition, the outrageous conduct issue was again left open, and this time, garnered a great deal of support. Justice Powell specifically stated in his concurrence that he could not agree with the plurality that "no matter what the circumstances, neither due process principles nor [the Court's] supervisory power could support a bar to conviction in any case where the Government is able to prove disposition" and further stated that the judiciary should bar a defendant's conviction "as a matter of law where the subject of the criminal charge is the sale of contraband provided to the defendant by Government agent." *Id.* (Powell, J., concurring). According to *United States v. Santana*, 6 F.3d 1 (1st Cir. 1993), *Hampton* legitimated the doctrine of outrageous conduct.

Since the *Hampton* decision, every United States Court of Appeals has been faced with the outrageous conduct defense and has examined the cases to determine if the convictions should be judicially barred due to the government's tactics. Not surprisingly, government action has rarely been proven to rise to this level. However, two circuits, the Ninth and the Third, have reversed convictions due to the government's overactive involvement in the creation of the crimes.

In *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978), the defendant was convicted by the government's use of an informant who contacted the defendant to set up a drug laboratory. The government provided the informant with the equipment and chemicals to create the lab, and a building in which to house it. The informant then controlled the finished lab. In fact, the informant directed the defendant in all of his actions. The

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[3] 425 U.S. 484, 495 n.7 (1976) (Powell, J., concurring.) Justices Powell, Blackmun, Brennan, Marshall, and Stewart expressed their support for a due process based challenge. See, *id.* at 495 (Powell, J., concurring); *Id.* at 496-499 (Brennan, J., dissenting).

defendant did not furnish supplies, money, or skills to the scheme; he simply followed the informant's suggestions and instructions, using the informant's tools and space. The Third Circuit determined that these circumstances rose to a level of outrageousness sufficient to reverse the conviction, since the government's actions violated concepts of fundamental fairness. Id. at 381.

Similarly, in *United States v. Solorio*, 1994 WL 509047 (9th Cir. 1994) attached hereto as Appendix F, decided shortly after the Tucker decision, the Ninth Circuit reversed a conviction due to the overzealous tactics of the government. The government obtained the conviction for conspiracy to sell methamphetamine of defendant Bobby Thomas through the use of an informant who was paid on a contingency basis for every successful conviction. The informant, Barruetta, was paid depending on the success of the operation, the amount of drugs involved, and the value of any assets seized in the operation. Barruetta was paid only minimum wage for his time spent on unsuccessful operations. For his services in the Thomas case, he was paid $2000, and in fact earned more that $50,000 overall in his role as an informant. To say that Barruetta had great incentive to create convictions for the government is an understatement. In fact, just prior to the transaction which led to Thomas' conviction, Barruetta remarked to a DEA agent, "We'll see if this goes through, son of a bitch, I need some cash. I practically don't have tires left, son of a bitch." *Id.* at *1. Barruetta approached a friend of Thomas', and a known drug-dealer who was the target of this investigation, and expressed interest in obtaining methamphetamine. Thomas friend subsequently approached Thomas, asking him to help find the requested drugs. Although Thomas at first refused, he eventually relented. Although offered marijuana and cocaine, he declined the drugs. He expected to make no money from this deal, but was attempting to help his friend. When the drugs were delivered to

Thomas, he and the others involved were arrested.

The Ninth Circuit found that this conduct was so outrageous that "due process principles should bar the government from invoking judicial processes to obtain a conviction." *Id.* at *7. The court found that contingent fee arrangements such as the one employed in this case which depend, not on the amount of information obtained, but instead on the drug amounts involved and seized, and the success of the prosecution, [create] perverse incentives for confidential informants". *Id.* at *4. The court further found that "[h]ere, these incentives were compounded by the fact that the confidential informant was the choreographer of the crime." *Id.* Thus, the court refused to condone the conduct and reversed the conviction. *Id.* at *6.[4]

Although these two cases are the only courts of appeals cases to squarely base their holdings on the validity of the doctrine of outrageous conduct,[5] every other circuit has taken the time, the resources and the effort to examine various cases under the framework of the outrageous conduct doctrine, although ultimately determining that the circumstances of each particular case did not rise to the level of outrageousness required for reversal of convictions.

In *United States v. Santana*, 6 F.3d 1 (1st Cir. 1993), although refusing to apply the outrageous conduct doctrine to the

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[4] Although this case was decided after the Tucker decision, it's holding serves to sufficiently rebut Tucker's assertion that the doctrine of outrageous conduct only exist in dicta, or a current subject of ridicule.

[5] The Sixth Circuit in *Tucker* correctly lists two other decisions which have "come close" to finding an outrageous conduct violation: *United States v. Bogart*, 783 F.2d 1428, 1438 (9th Cir.) vacated in part on other grounds sub nom. *United States v. Wingender*, 790 F.2d 802 (9th Cir. 1986), which remanded the case to the district court for determination of the outrageous conduct issue, and *United States v. Lard*, 734 F.2d 1290 (8th Cir. 1984), which found an entrapment violation, but stated, in addition, that the conduct of the government "approached" outrageousness. *Id.* at 1296.

facts of that case, the First Circuit Court of Appeals nevertheless noted that Hampton "succeeded in legitimating the doctrine," and then devoted twelve pages of thoughtful commentary to the subject. *Id.* at 3. The court concluded its opinion by stating that

> the outrageous conduct doctrine, no matter how cramped its confines, is not entirely mummified. Should the occasion and the necessity arise, we continue to believe that the law will prove itself adequate to the task of preventing the government from going too far. In the war on crime, as in conventional warfare, some tactics simply cannot be tolerated by a civilized society.

Santana, 6 F.3d at 10.

The Second Circuit, in *United States v. Chin*, 934 F.2d 393 (2d Cir. 1991), stated that finding an outrageous conduct violation "must turn on whether the governmental conduct, standing alone, is so offensive that it shocks the conscience." *Id.* at 398.

In *United States v. Gonzalez*, 927 F.2d 139 (3d Cir. 1991), the Third Circuit left open the possibility that the actions of the government might be "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *Id.* at 144.

In *United States v. Osborne*, 935 F.2d 32 (4th Cir. 1991), in order to find a due process violation, the Fourth Circuit required governmental conduct which is "so outrageous as to shock the conscience of the court." *Id.* at 36.

Similarly, the Fifth Circuit, in *United States v. Smith*, opined that extremely "outrageous police conduct may afford the accused a substantive defense to the prosecution." *Id.* at 1167.

Prior to the Tucker decision, the Sixth Circuit, in *United States v. Barger*, 931 F.2d 359 (6th Cir. 1991), stated that "a plurality of the United States Supreme Court in *Hampton* (citation omitted) indicated that some police conduct might be so egregious

as to violate the accused's due process rights", but that the "challenged government conduct must violate fundamental fairness and be 'shocking to the universal sense of justice.'" *Id.* at 363 (quoting *United States v. Russell*, 411 U.S. 423, 432). Although ultimately determining that the conduct in *Barger* was not so shocking, the court did enumerate four factors to use in making such a determination, and thoroughly considered these factors in light of the instant facts.

The Seventh Circuit, in *United States v. Davis*, 15 F.3d 1393 (7th Cir. 1994), noted, as have other circuits that "[t]he outrageous conduct doctrine presents an extremely narrow opportunity for a defendant to challenge government conduct violating his due process rights." *Id.* at 1415.

In *United States v. Kummer*, the Eighth Circuit agreed with the accused who asserted that "the due process/outrageous conduct argument was not foreclosed by *Hampton*" but could not agree that the government's conduct, in Kummer's case, was "sufficiently unpalatable to require a finding that his due process rights were violated." *Id.* at 1459-60.

Further, in *United States v. Lard*, 734 F.2d 1290 (8th Cir. 1984), the court concluded that the government entrapped Lard, but also noted that "apart from the entrapment defense, [the government's conduct] here approached being so outrageous that due process principles should bar the government from invoking judicial processes to obtain a conviction. *Id.* a 1296 (quoting *United States v. Russell*, 411 U.S. at 431-32).

In *United States v. Bogart*, 783 F.2d 1428 (9th Cir. 1986), the Ninth Circuit noted that they "have repeatedly held that the due process outrageous conduct defense survived the [Supreme] Court's review." *Id.* at 1432.[6]

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[6] In 1994, the Ninth Circuit recognized an outrageous conduct violation in *United States v. Solorio*, 1994 WL 509047 (9th Cir. 1994).

The Tenth Circuit in *United States v. Mosely*, 965 F.2d 905 (10th Cir. 1992), plainly stated that "outrageous conduct is a viable defense." The court further noted that "[w]hen the government's conduct during an investigation is sufficiently outrageous, the courts will not allow the government to prosecute offenses developed through that conduct." *Id.* at 908-09.

The Eleventh Circuit, in *United States v. Michael*, 17 F.3d 1383 (11th Cir. 1994), stated that in egregious cases, "federal courts possess the authority to dismiss an indictment for governmental misconduct." *Id.* at 1386.

In *United States v. Nicely*, 922 F.2d 850 (D.C.Cir. 1991), the District of Columbia Circuit noted that "police overinvolvement" could "violate due process", but concluded that this was not such a case. *Id.* at 860.

The Sixth Circuit, in *Tucker*, conceded that in more than two dozen cases, the court has addressed the outrageous conduct doctrine, but has rejected the application of the doctrine to the facts of each case. Thus, the court termed every word uttered about this doctrine in each of these two dozen cases as merely dicta, and found no Sixth Circuit authority "which holds that the government's conduct in inducing the commission of a crime, if "outrageous" enough, can bar prosecution of an otherwise predisposed defendant under the Due Process Clause of the Fifth Amendment." *Tucker*, at 10. Likewise, the court defined decisions of other circuits as dicta because, although the doctrine was mentioned, discussed, and ruled upon, the courts, with one exception, found that the doctrine did not apply to the facts of the cases. The court discounted the one case which it acknowledged had found a due process outrageous conduct violation, *United States v. Twigg*, because other Third Circuit opinions have either declined to follow the case, or have criticized the reasoning in the case. *See Tucker*, at 11 (citing *United States v. Beverly*, 723 F.2d 11,12 (3d Cir. 1983). However, other subsequent decisions have

followed *Twigg*, and have found merit in its reasoning. *See United States v. Bogart*, 783 F.2d 1428, 1434 n.3 (9th Cir. 1986); *United States v. Gardner*, 658 F.Supp. 1573, 1579 (W.D.Penn. 1987).

The court specifically states that the defense has been recently subjected to ridicule in the case of *United States v. Santana*, 6 F.3d 1 (1st Cir. 1993), because the First Circuit characterized the doctrine as the "deathbed child of objective entrapment, a doctrine long since discarded in the federal courts." *Id.* at 3-4. However, and on the contrary, the First Circuit is colorfully describing how the outrageous conduct doctrine was born of the death of the objective entrapment theory. Objective entrapment *is* dead in the federal courts,[7] but outrageous conduct remains. The true meaning of the court's statement is glaringly obvious from the remainder of the court's opinion. The court notes that "case after case confirms its continued existence," and cites a dozen cases in support of this statement. *Id.* at 4. Although the court eventually rejects the application of the theory to the instant facts, it makes clear that the doctrine is not "mummified", and opines that "[s]hould the occasion and the necessity arise, we continue to believe that the law will prove itself adequate to the task of preventing the government from going too far" because, "[i]n the war on crime. . . some tactics simply cannot be tolerated by a civilized society." *Id.* at 12.

The doctrine is not dead, and these decisions are not dicta. Most of the cases discussed above are extremely recent, not discarded ancient decisions which have fallen into disfavor. The most recent, *Solorio*, is the most vocal champion of the doctrine. In *Solorio*, the Ninth Circuit describes the doctrine as a "prophylactic rule that enables the courts to exercise a supervisory role over the government's activities and to ensure that the executive branch carries out its tasks in a lawful manner." After

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[7] See *Sherman v. United States*, 356 U.S. 369, 372 (1958).

examining the overzealous sting operation which resulted in wrongful conviction, the court ruled that "[w]e cannot condone the government's actions in this case. Law enforcement agents are entrusted with awesome power. But with that power also comes a responsibility to guard against its abuse, a responsibility that the government has abdicated." These are not words spoken of a dying, ridiculed doctrine. These are the words spoken of a doctrine which is a living, suckling infant growing as the courts fulfill their oversite function.

In addition, describing the hundreds of decisions on this subject in the courts of appeals as dicta is nothing but a semantical escape route derogating to every judge on every court which has expended time, effort, and considerable thought in examining and ruling upon this issue. The Sixth Circuit held, in *United States v. Gillespie*, 321 F.2d 518 (6th Cir. 1963), that a decision is not dictum if the issue was properly before a court, and was argued upon, and decided upon. *Id.* at 530. This was the case in the numerous cases previously cited. In fact, Judge Martin, in his concurrence to the Tucker opinion agrees:

> In *Barger* and in *United States v. Payne*, 962 F.2d 1228, 1231-33 (6th Cir.), *cert. denied*, 113 S.Ct. 306, and *cert. denied*, 113 S.Ct. 811 (1992), . . . we engaged in a lengthy analysis of each factor under the circumstances of the particular case. This analysis was undertaken, in both instances, in a separate section of the opinion devoted solely to the briefed and argued issue of outrageous government conduct, and not simply in a passing statement or cursory, superfluous commentary. Accordingly, I cannot agree with the majority's characterization of this repeated treatment as dicta. It seems clear to me that this Circuit has recognized outrageous government conduct as a

> valid due process defense, and as the majority concedes, the Supreme Court has not clearly held otherwise.

Tucker, at 21 (Martin, J. concurring).

In addition, Black's Law Dictionary defines "dictum" as "[a] statement, remark, or observation. . . which a party is not bound to make," while "holding" is defined as "the legal principle to be drawn from the opinion of the court." More succinctly, holding is what a case establishes, while dictum is "what its opinion may say that is not established." Kent Greenawalt, *Reflections on Holding and Dictum*, 39 J.LEGAL EDUC. 431 (1989).

The statements of all these courts in all these decisions were not merely remarks or observations which the court was not required to make. These rulings were the courts thorough attempts to address the question which was properly before them: whether the government's conduct rises to a shocking intolerable level, so as to offend due process. These rulings did constitute legal principles to be drawn from the opinions of the courts, and did establish that these actions, that these courses of conduct of the government, did not rise to the necessary level to legally constitute outrageous conduct sufficient to bar the prosecutions.

This is abundantly clear from court's statements regarding prior decisions rejecting the application of the outrageous conduct doctrine to specific factual situations. Many courts which have refused to find a due process violation on the facts before them have done so by comparing the instant situation with that of previous cases which found no violation. In *United States v. Kummer*, the court cited the previous decision of *United States v. Huff*, 959 F.2d 731 (8th Cir. 1992), which was factually similar to the *Kummer* situation, and where the Eighth Circuit found no outrageous conduct due process violation. The *Kummer* court stated that "[t]he relevant facts here are not substantially different from those in *Huff*. We therefore do not find that the police

conduct in this case was so outrageous as to constitute a violation of Kummer's due process rights." *Kummer*, 15 F.3d at 1460. See also, *United States v. Nicely*, 922 F.2d 850 (D.C.Cir. 1991). The decisions of these courts do more than merely assuming that the doctrine exists while stating that it would not apply to the facts at issue; these courts hold that the doctrine of outrageous conduct does not apply to the circumstances before them. These are legal holdings, and should be regarded as applicable precedent.

2. **The Court of Appeals for the Sixth Circuit erred when it determined that no outrageous conduct due process defense should exist to protect United States citizens from overzealous investigatory tactics which create crimes where none would have been committed absent government intervention.**

According to Supreme Court Rule 10.1(c), a petition for writ of certiorari may be granted "[w]hen . . . a United States court of appeals has decided an important question of federal law which has not been, but should be settled by this Court." The decision of the United States Court of Appeals for the Sixth Circuit in Tucker has decided the important issue of the existence of the doctrine of outrageous conduct. The question of whether this doctrine should exist to address overzealous government investigation tactics is ripe for decision of this Court.

As discussed previously, Supreme Court decisions have refused to foreclose the possibility of the existence of an outrageous conduct defense. In *United States v. Russell*, 411 U.S. 423 (1973), the Court stated that it "may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a

conviction." *Id.* at 423. Further, five justices appeared to agree, in *Hampton*, that even if a defendant was predisposed to commit a certain crime, the conduct of the government might reach a "demonstrable level of outrageousness" meriting a bar of a conviction for due process reasons.[8] Specifically, Justice Powell refused to agree with the plurality that "no matter what the circumstances, neither due process principles nor [the Court's] supervisory power could support a bar to conviction in any case where the Government is able to prove disposition" and further stated that the judiciary should bar a defendant's conviction "as a matter of law where the subject of the criminal charge is the sale of contraband provided to the defendant by Government agent." *Hampton*, 96 S.Ct. at 1646-1654. According to *United States v. Santana*, 6 F.3d 1 (1st Cir. 1993), *Hampton* legitimated the doctrine of outrageous conduct, which the Sixth Circuit Court of Appeals has attempted to wholly reject.

The clearest illustrations of the necessity of this doctrine are the decisions which have embraced it. In *United States v. Twigg*, the government procured an indictment and ultimately a conviction by using an informant who contacted the defendant to set up a drug laboratory. The informant, through the government, furnished the equipment and chemicals necessary to create the lab, and the building in which the lab was housed. The informant almost single handedly created the lab and then exercised control over the finished lab. In fact, the informant directed the defendant in all of his actions. The defendant furnished no supplies, money, or skills to the enterprise; he simply followed the informant's suggestions and instructions using the informant's tools, space, and expertise. The Third Circuit stated that

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[8] 425 U.S. 484, 495 n.7 (1976) (Powell, J., concurring.) Justices Powell, Blackmun, Brennan, Marshall, and Stewart expressed their support for a due process based challenge. See, *id.* at 495 (Powell, J., concurring); *Id.* at 496-499 (Brennan, J., dissenting).

> This egregious conduct on the part of government agents generated new crimes by the defendant merely for the sake of pressing criminal charges against him when, as far as the record reveals, he was peacefully minding his own affairs. Fundamental fairness does not permit us to countenance such actions by law enforcement officials and prosecution for a crime so fomented by them will be barred.

In *United States v. Lard*, the defendant was convicted of conspiring to transfer and transferring a pipe bomb. Lard was introduced to undercover federal agents by an informant who the informant claimed were interested in buying guns from Lard. Lard had absolutely no prior record. He did tell the agents that he had a shotgun which he refused to sell. Lard then attempted to sell the agents some shotgun shells and a small detonator, acts which were not illegal. One of the agents, Anderson, instead suggested that Lard sell him a "pipe bomb". Lard initially resisted this idea, but Anderson repeatedly implored him, stating that he needed something powerful to blow up a car. After numerous requests, Lard relented, and agreed to make and sell the pipe bomb. Again, Lard had no criminal record, no history of dealings in unregistered firearms, did not suggest the sale of the pipe bomb, and despite Anderson's "repeated baiting", was reluctant to enter into the pipe bomb transaction.

The Court of Appeals for the Eighth Circuit found that these actions constituted entrapment, and reversed Lard's conviction. In addition, the court stated that, entrapment aside, "Agent Anderson's overinvolvement in conceiving and contriving the crimes here approached being 'so outrageous that due process principles should bar the government from invoking judicial processes to obtain a conviction.'" *Id.* at 1296. The government officials were not trying to discover and punish ongoing crimes,

but rather to "[create] new crimes for the sake of bringing criminal charges against Lard, who, before being induced, was lawfully and peacefully minding his own affairs." *Id.* Further, the court stated that "[c]oncepts of fundamental fairness preclude us from putting our imprimatur on law enforcement overreaching conduct designed to instigate 'a criminal act by persons otherwise innocent in order to lure them to its commission and to punish them.'" *Id.* at 1297 (quoting *Russell*, 411 U.S. at 428-29).

Similarly, in the recent *Solorio* decision, the Ninth Circuit reversed a conviction due to the overzealous tactics of the government. The government obtained the drug conviction of the defendant Thomas by paying an informant on a contingency basis for every successful conviction. Payment was expressly conditioned on the success of the operation, the amount of drugs involved, and the value of any assets seized in the operation, while if an operation was unsuccessful Barruetta was paid only minimum wage for his time spent. For his services in the Thomas case, he was paid $2000, and in fact earned more that $50,000 overall as an in his role as an informant. The Court of Appeals for the Ninth Circuit stated that this type of contingent fee arrangement "creates perverse incentives for confidential informants." *Id.* at *6. This is evident from Barruetta's remarks just prior to the buy from Thomas: "We'll see if this goes through, son of a bitch, I need some cash. I practically don't have tires left, son of a bitch." *Solorio*, at *1.

In response to this incentive, Barruetta constructed the entire crime. He initially approached the person who put him into contact with Thomas, and expressed interest in obtaining methamphetamine; Thomas never approached anyone. Although Thomas at first refused to provide anyone with drugs, he eventually relented. Although offered marijuana and cocaine, he declined the drugs. He expected to make no money from this deal, but was attempting to help his friend. When the drugs were

delivered to Thomas, he and the others involved were arrested.

The Ninth Circuit found this conduct to be "so outrageous as to violate due process", refused to condone the conduct and reversed the conviction, particularly because of their concern over the enormous incentive which the contingent fee arrangement provided. *Id.* at *6.

Equally as illustrative is the instant case. The petitioner, Ms. Tucker was not a known food stamp purchaser. Prior to this incident, she was essentially a law-abiding citizen minding her own business. When asked to purchase food stamps, she continually refused. This is not a case of a closet criminal who just needed the bait dangled in front of her; Ms. Tucker obviously was not interested. The only thing that induced her to purchase food stamps was her desire to help out her friend, Hancock, the informant. Ms. Tucker was an ordinary person who was "approached by a confidential informant working on a contingency fee basis that was a friend . . . who used sympathetic ruses, . . . about her health and her children." Appendix E.

These cases make eminently clear the extreme circumstances under which the doctrine is invoked, and the need for some type of redress against these actions.

In addition, it is important to note that even those courts which have not found such egregious actions meriting the invocation of the doctrine have refused to foreclose the possibility that those instances may exist, and that the doctrine should be available to address the resulting unfair convictions. The list of cases stating this is so extensive that every such case is not mentioned here. However, the Sixth Circuit listed over a dozen such cases in its decision in *Tucker*, and many are listed in the first part of this petition.

The First Circuit in *Santana* stated this principle best when it said

Should the occasion and the necessity arise, we

> continue to believe that the law will prove itself adequate to the task of preventing the government from going too far. In the war on crime, as in conventional warfare, some tactics simply cannot be tolerated by a civilized society."

The decisions finding an outrageous conduct violation and the courts who refuse to deny the existence of the doctrine, illustrate and explain why the doctrine exists. The power our society invests in law enforcement officials is enormous. Though that power is not without certain checks, without the outrageous conduct doctrine, these instances would slip through the cracks. People who are lawfully and peacefully minding their own affairs should not be exposed to unrelenting, persuasive investigatory tactics designed to create crimes which these people had absolutely no intent to commit prior to the injection of seedy, unscrupulous informants who are being paid well to hand the government convictions. Creating crimes which would not have existed prior to the prodding by the government does nothing to remove crime from the streets. It only serves to elicit latent criminal tendencies from otherwise law-abiding citizens, who, absent the invitation, the means, and some overwhelming persuasion, would probably never set foot into the criminal arena. Nothing is accomplished, and time, resources and efforts of law enforcement agencies throughout the country are most certainly better served by investigating ongoing crimes, committed with criminals' resources, which are the product of criminal minds.

Policy reasons aside, this doctrine legitimately derives its power from the Due Process Clause of the Fifth Amendment. The clause mandates fundamental fairness which cannot be had in situations such as those mentioned above. Convictions under indictments which were unconstitutionally procured cannot be tolerated.

Although the Sixth Circuit opinion in *Tucker* gave three reasons why this doctrine should not exist, none of these reasons sufficiently justifies allowing the law enforcement authorities free reign to manufacture crimes and then prosecute the individuals who were baited and prodded and coerced into committing those crimes. The first reason stated, that "government conduct which induces a defendant to commit a crime, even if labelled "outrageous," does not violate that defendant's constitutional right of due process", is incorrect. The Fifth Amendment's promise of fundamental fairness is violated by unfair investigations, unfair indictments and unfair convictions.

The second concern, that "the district court lacked authority to dismiss the indictment for governmental misconduct where no violation of an independent constitutional right has been shown", is also incorrect. As stated before, due process is implicated in any prosecution in which the indictment was unfairly procured. The *Solorio* court stated that "[a]t a minimum, the Due Process Clause protects against the conviction of individuals on the basis of evidence that has . . . a high risk of being false." *Solorio*, 1994 WL 509047 at *6. The court found this to be the case with indictments procured through the use of informants paid contingency fees. In addition, the right to privacy is implicated by overzealous investigatory techniques such as those used in Tucker. Using friends and neighbors to induce people to commit crimes certainly is an invasion of privacy worthy of constitutional protection.

The third concern articulates precisely the reason why this doctrine must be recognized. The Sixth Circuit's last concern is that the doctrine invades upon the province of the Executive Branch. When the Executive Branch so overzealously forces the commission of crimes, the Judicial Branch must not compound that wrong entertaining these charges. It must perform its oversite function implicit in the creation of the three separate branches of

government.

However, most importantly, none of these three reasons kept the majority of this Court in Hampton, nor every other circuit court of appeal, from determining that such outrageous violations of due process might one day present themselves which would be sufficient to merit dismissing the indictments for lack of fundamental fairness.

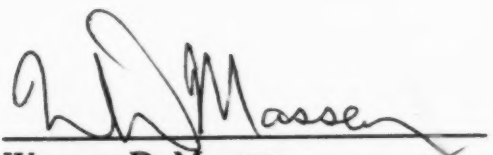
The Sixth Circuit is plainly in error in foreclosing a well-established, extensively litigated doctrine which has been specifically reserved by the Supreme Court. As such, this question is an important one in need of review by this Court.

CONCLUSION

For the foregoing reasons, Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted this 23rd day of November, 1994.

Respectfully submitted,



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APPENDIX A

No. 93-6028

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

Brenda TUCKER and **Barbara McDonald,**
Defendants-Appellees.

ON APPEAL from the United States District Court for the Western District of Tennessee

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Decided and Filed July 15, 1994.

Before: MARTIN, SUHRHEINRICH, and SILER, Circuit Judges.

SUHRHEINRICH, Circuit Judge, delivered the opinion of the court, in which SILER, Circuit Judge, joined. MARTIN, Circuit Judge (pp. 1429-30), delivered a separate opinion concurring in the result.

SUHRHEINRICH, Circuit Judge.

Defendants were indicted for purchasing, and aiding and abetting the purchase of, food stamps in violation of 7 U.S.C. s 2024(b)(1). Defendants moved to dismiss the

indictment, claiming that the government's conduct in inducing defendants to commit their crimes was so "outrageous" that it violated their due process rights. The district court referred the matter to a magistrate judge for evidentiary hearings, findings and recommendations. The magistrate's report recommended dismissal, the district court accepted this recommendation and the government, pursuant to 18 U.S.C. s 3731, appeals. Because we find no binding authority requiring or even authorizing this court to conduct a purely objective assessment of the government's conduct in this case, we decline to do so. Defendants' assertion of a "due process" defense based upon such an assessment is, in our view, nothing more than a claim of entrapment and, accordingly, we REVERSE and REMAND for trial.

I. Facts

Defendants' indictment arose out of a "reverse sting," i.e., an operation in which "the police pose as sellers of [contraband], set up deals with would-be buyers under carefully controlled conditions, and arrest the purchasers following the sham sale." *Owen v. Wainwright*, 806 F.2d 1519, 1520 (11th Cir.1986), *cert. denied*, 481 U.S. 1071, 107 S.Ct. 2466, 95 L.Ed.2d 875 (1987). The operative in this case, Linda Hancock, was hired by the United States Department of Agriculture to help "catch ... a lot of people that had been abusing the [food stamp] system." Hancock worked on a "commission" of sorts, keeping half the money collected from her sale of food stamps. She was not told whom she should approach, just that she should find people willing to buy the stamps below face value and secretly record the transactions.

In November of 1990, Hancock called defendant Tucker, a friend of more than ten years. Claiming that she was in dire financial need, Hancock told Tucker that she was going

to have to sell her family's food stamps in order to provide a "proper Christmas" for her children. After first resisting, Tucker finally purchased the stamps when Hancock later appeared at her beauty salon dressed in a manner suggesting her financial distress. When Hancock asked who else Tucker thought might buy some stamps, Tucker sent Hancock to McDonald, one of Tucker's employees. McDonald also purchased food stamps from Hancock after listening to her tales of ill-health and financial need.

In accepting the magistrate judge's Report and Recommendation, the district court stated:

> I don't think we are at a point in our criminal history where the government needs to lower itself into targeting sympathetic ploys on citizens that are not otherwise suspected of engaging in criminal conduct ... [Food stamp trafficking] is not such a terrible offense that the government, in my view, should be permitted to use agents under the totality of the facts of this case ... [C]ertainly there is no reason why the government cannot use undercover agents, cannot pay those undercover agents, cannot have undercover agents deal with friends, cannot use untrue ploys. All of those things individually are certainly useful techniques for investigation. But when they are employed in totality with people who are not otherwise suspected of engaging in crime, it seems to me that the conduct, as the Magistrate concluded, crosses [the constitutional] boundary.

(J.A. at 169-72).

We review the district court's dismissal de novo.[1] See *United States v. Leja*, 563 F.2d 244, 245-46 (6th Cir.1977), cert. denied, 434 U.S. 1074, 98 S.Ct. 1263, 55 L.Ed.2d 780 (1978).

II. The "Due Process" Defense

Defendants argue that this court may, indeed must, undertake an independent, objective assessment of the government's methods in this case and, if we find them to be "outrageous," affirm the district court's decision to dismiss. Before engaging in the highly suspect process of labeling the conduct of a co- equal branch of our government as either "outrageous" or "not outrageous," we are compelled to determine precisely upon what authority we would do so.

A. Entrapment

Any analysis of the so-called "due process" defense must, in our view, begin with the law of entrapment. The Supreme Court first recognized an entrapment defense in *Sorrells v. United States*, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932). In doing so, the Court resolved a deep split of authority as to whether the focus of the defense was "objective" (looking to the government's conduct), or "subjective" (looking

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[1] Several of the magistrate judge's findings of fact relating to the amount of deception employed by the undercover operative in this case were hotly disputed. The magistrate judge resolved those disputes in favor of the defendants on the basis of the credibility of the witnesses. While the legal sufficiency of the defendants' defense is reviewed de novo, the factual findings must be accepted unless found to be clearly erroneous. See United States v. Hart, 963 F.2d 1278, 1284 (9th Cir.1992). Here, there is no basis to reject the magistrate judge's findings. See United States v. Taylor, 956 F.2d 572, 576 (6th Cir.) (en banc) (lower court's factual findings, if expressly based upon credibility evaluations, are beyond appellate review), cert. denied, --- U.S. ---, 113 S.Ct. 404, 121 L.Ed.2d 330 (1992).

to the defendant's predisposition). The Court, siding squarely with the subjective theory, held that a "defendant [who] seeks acquittal by reason of entrapment ... cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue." *Id.* at 451, 53 S.Ct. at 216.

The Court rejected an invitation to revitalize an "objective" entrapment defense in *Sherman v. United States*, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958), holding that entrapment was the "line ... between the trap for the unwary innocent and the trap for the unwary criminal." *Id.* at 372, 78 S.Ct. at 821 (emphasis added). Again, in *United States v. Russell*, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973), the Court rejected the "objective" approach to entrapment, stating:

> [Sorrells and Sherman] establish that entrapment is a relatively limited defense. It is rooted, not in any authority of the Judicial Branch to dismiss prosecutions for what it feels to have been 'overzealous law enforcement,' but instead in the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense but was induced to commit them by the Government. *Id.* at 435, 93 S.Ct. at 1644 (emphasis added).[2]

To this point, therefore, it was absolutely clear that a defendant, whose predisposition to commit a particular crime

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[2] The dissenters in Russell (Justices Stewart, Brennan, Marshall and Douglas) joined the dissenters in Sherman (Justices Frankfurter, Douglas, Harlan and Brennan) and the concurring Justices in Sorrells (Justices Roberts, Brandeis and Stone) in support of the ill-fated "objective" defense.

was proved beyond a reasonable doubt, could not defend against prosecution on the basis that the government induced him to commit that crime, no matter how strong the inducement or "outrageous" the government's conduct.

B. "Outrageous Conduct"

In *Russell*, the defendant argued that the defense of entrapment should be founded on constitutional principles rather than congressional intent. He argued that the government's involvement in creating his crime, i.e., the means and degree of inducement, was so great "that a criminal prosecution for the [crime] violates the fundamental principles of due process," his predisposition to commit the crime notwithstanding. *Russell*, 411 U.S. at 430, 93 S.Ct. at 1642. The defendant argued that, just as with the exclusionary rule created in *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), and *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), dismissal was an appropriate means of deterring future police misconduct.

The Court soundly rejected this argument, stating that "the defense of entrapment ... was not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve." *Russell*, 411 U.S. at 435, 93 S.Ct. at 1644. Rather, the "execution of the federal laws under our Constitution is confided primarily to the Executive Branch of the Government, subject to applicable constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations." *Id.* Because the defense of entrapment lacks a constitutional foundation, the Court rejected the defendant's analogy to Weeks and Mapp on the ground that, unlike the Fourth Amendment violations in those cases, "the Government's conduct here violated no independent constitutional right of the respondent." *Id.* at 430,

93 S.Ct. at 1642.

> The Court, however, went on to note the following: While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. *Rochin v. California*, 342 U.S. 165 [72 S.Ct. 205, 96 L.Ed. 183] (1952), the instant case is distinctly not of that breed.... The law enforcement conduct here stops far short of violating that 'fundamental fairness, shocking to the universal sense of justice,' mandated by the Due Process Clause of the Fifth Amendment. *Russell*, 411 U.S. at 431-32, 93 S.Ct. at 1643.

Since this dicta was uttered, Russell has been cited more than two hundred times as authority for a defense based solely on an objective assessment of the government's conduct. Thus, the Court's dicta in Russell spawned the very defense which a majority of Justices in that case sought to foreclose.

Recognizing the internal inconsistency of Russell, then-Justice (now Chief Justice) Rehnquist, who had penned the decision in Russell, soon sought to recant its "maybe someday" dicta. In *Hampton v. United States,* 425 U.S. 484, 489, 96 S.Ct. 1646, 1649-50, 48 L.Ed.2d 113 (1976) (plurality opinion), Justice Rehnquist rejected the defendant's Russell-inspired, "due process" defense on the ground that permitting such an objective assessment of the government's conduct, while ignoring the defendant's predisposition, "would run directly contrary to our statement in Russell ...." Justice Rehnquist elaborated:

> The limitations of the Due Process Clause of the Fifth Amendment come into play only when the Government activity in question violates some protected right of the Defendant.... If the result of the governmental activity is to "implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission....," *Sorrells*, supra 287 U.S. at 442 [53 S.Ct. at 212-13], the defendant is protected by the defense of entrapment. If the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law. *Id.* at 490, 96 S.Ct. at 1650 (emphasis added).

Thus, "[t]he remedy of the criminal defendant with respect of the acts of Government agents," Justice Rehnquist concluded, "lies solely in the defense of entrapment." *Id.* at 490, 96 S.Ct. at 1650 (emphasis added).

Justice Rehnquist's recantation of his Russell dicta, however, failed to gain a majority in Hampton. Justices Blackmun and Powell, who joined Justice Rehnquist in Russell, wrote separately to say that, although the facts of Russell and Hampton did not warrant dismissal under due process, they were "unwilling to conclude that an analysis other than one limited to predisposition would never be appropriate under due process principles." Hampton, 425 U.S. at 493, 96 S.Ct. at

1651-52 (Powell, J., concurring in the judgment).[3]

Justices Brennan, Stewart and Marshall, steadfastly adhering to the "objective" theory of entrapment which had failed to become law in Sorrells, Sherman and Russell, dissented from Justice Rehnquist's plurality opinion in *Hampton*, in part, to state that courts should be able to dismiss indictments "where the conduct of law enforcement authorities is sufficiently offensive, even though the individuals entitled to invoke such a defense might be predisposed." *Hampton*, 425 U.S. at 497, 96 S.Ct. at 1654 (Brennan, J., dissenting).

Thus, in *Hampton*, five Justices, two in dicta and three in dissent, left open the "objective" defense door which Justice Rehnquist had unlocked in Russell. We note, however, that just as Justice Rehnquist's comments in *Russell* were dicta, so too were his comments (and those of Justices Powell and Blackmun) in *Hampton*.

C. Sixth Circuit Authority

This court first addressed a "due process" defense claim in *United States v. Leja*, 563 F.2d 244 (6th Cir.1977), cert. denied, 434 U.S. 1074, 98 S.Ct. 1263, 55 L.Ed.2d 780 (1978). After reviewing the various opinions in Hampton, the court "conceive[d] the issue to be whether the governmental activity

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[3] Justice Powell did concede, however, that the Court, "in an appropriate case," "ultimately might reach" Justice Rehnquist's conclusion that there is "no [constitutional] source for a doctrine limiting police involvement in crime." Hampton, 425 U.S. at 494 n. 5, 96 S.Ct. at 1652 n. 5. Justice Powell, writing for a majority of the Court in United States v. Payner, 447 U.S. 727, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980) (discussed infra), seemed to abandon the position he had taken in Hampton when he held that sanctions are justified under the Due Process Clause only where the governmental misconduct "violates some protected right of the defendant." Id. at 737 n. 9, 100 S.Ct. at 2447 n. 9 (quoting Hampton, 425 U.S. at 490, 96 S.Ct. at 1650 (plurality opinion) (Rehnquist, J.)).

... so offends our concepts of fundamental fairness as to justify the extraordinary employment of judicial power to curb it." *Id.* at 246. The court then rejected the defendant's "due process" defense, reasoning that if the absence of predisposition is merely a statutory and not a constitutional defense, "it is difficult indeed to prohibit on constitutional grounds the prosecution of the defendants ... [who] were clearly predisposed to commit the acts." *Id.* at 247. The court also declined to employ its "supervisory powers" to dismiss the indictment, holding that to do so in the absence of a constitutional violation would amount to nothing more than the "chancellor's foot" veto against which the Supreme Court had warned in *Russell*. *Id.* (quoting Russell, 411 U.S. at 435, 93 S.Ct. at 1644).

Thus, in *Leja*, this court rejected the "due process" defense on very broad grounds and further held that, in the absence of a constitutional violation, the courts had no authority to bar a defendant's prosecution as a means of deterring law enforcement misconduct. The panel, however, refused to acknowledge the per se rule to which its analysis seemed to lead. Instead, in language reminiscent of Justice Rehnquist's dicta in *Russell*, the Leja panel went on to observe:

Like Judge Friendly in *United States v. Archer*, [486 F.2d 670 (2d Cir.1973)], and like Justice Powell in *Hampton*,[4] we determine never to say "never" as long as the potential for

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[4] The Leja panel's reliance upon Justice Powell's dicta in Hampton proved unfounded when Justice Powell abandoned that position in United States v. Payner, 447 U.S. 727, 737 n. 9, 100 S.Ct. 2439, 2447 n.9, 65 L.Ed.2d 468 (1980). See, supra at note 3. In addition, at least one court has noted that Payner called into question the continued validity of Archer, upon which the Leja panel also relied. See United States v. Santana, 6 F.3d 1, 9 (1st Cir.1993).

abuse of individual rights exists in governmental action. *Leja*, 563 F.2d at 247 (emphasis added).

In more than two dozen cases since Leja, this circuit has rejected "on the facts" every attempt to invoke the so-called "due process" defense. See, e.g., *United States v. Barger*, 931 F.2d 359, 363-64 (6th Cir.1991); *United States v. Qaoud*, 777 F.2d 1105, 1110-11 (6th Cir.1985), cert. denied, 475 U.S. 1098, 106 S.Ct. 1499, 89 L.Ed.2d 899 (1986); *United States v. Norton*, 700 F.2d 1072, 1076 (6th Cir.), cert. denied, 461 U.S. 910, 103 S.Ct. 1885, 76 L.Ed.2d 814 (1983); *United States v. Brown*, 635 F.2d 1207, 1213 (6th Cir.1980). In our view, therefore, there is no authority in this circuit which holds that the government's conduct in inducing the commission of a crime, if "outrageous" enough, can bar prosecution of an otherwise predisposed defendant under the Due Process Clause of the Fifth Amendment. *Leja* and the cases just cited do nothing more than "assume" the existence of such a defense while "holding" that it would not apply under the present facts. Because "one panel of this court is not bound by dicta in a previously published panel opinion," United States v. Burroughs, 5 F.3d 192, 194 (6th Cir.1993), we hold that the legal existence of defendants' asserted "due process" defense is an open question in this circuit which we are free to address in the first instance.

D. Other Circuits' Authority

Having concluded that there is no binding authority recognizing defendants' asserted "due process" defense, we look to our sister circuits for persuasive authority. To date, however, only one appellate court has employed *Russell* to bar

a prosecution.[5] In *United States v. Twigg*, 588 F.2d 373 (3d Cir.1978), a government agent suggested to the defendant that they set up a drug manufacturing operation, located a site for the plant, supplied the materials and the know-how as well as the funds to "go into business." *Id.* at 380-81. The court reversed the defendant's convictions for manufacturing the drugs, stating that "[f]undamental fairness does not permit us to countenance such actions by law enforcement officials and prosecution for a crime so fomented by them will be barred." *Id.* at 381.

We note, however, that this holding has been disavowed by the Third Circuit on the ground that the Twigg court improperly relied on United States v. West, 511 F.2d 1083 (3d Cir.1975), which had been limited by Hampton and other, more recent, Third Circuit opinions. See *United States v. Beverly*, 723 F.2d 11, 12 (3d Cir.1983) (citing *United States v. Jannotti*, 673 F.2d 578, 610 n. 17 (3d Cir.1982) (en banc), cert. denied, 457 U.S. 1106, 102 S.Ct. 2906, 73 L.Ed.2d 1315 (1982)). Accordingly, we do not consider Twigg persuasive on the issue of whether or not a "due process" defense should be recognized.

The other courts of appeals have, like our own circuit, doggedly applied the *Russell* dicta; analyzing and rejecting numerous fact patterns in search of governmental

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[5] Two other courts have come close. See United States v. Bogart,783 F.2d 1428, 1438 (9th Cir.) (remanding for factfinding regarding the government's conduct), vacated in part on other grounds sub nom. United States v. Wingender, 790 F.2d 802 (9th Cir.1986); United States v. Lard, 734 F.2d 1290, 1296 (8th Cir.1984) (stating, as an alternative ground for reversing conviction, that government conduct "approached" being sufficiently outrageous to sustain due process defense).

"overreaching" which "shocks the conscience" or violates "fundamental fairness."[6] In recent years, this defense increasingly has been subjected to ridicule, see *United States v. Santana*, 6 F.3d 1, 3-4 (1st Cir.1993) (defense is the "deathbed child of objective entrapment, a doctrine long since discarded in the federal courts"), and at least one circuit judge has expressly advocated that it be abandoned. See United States v. Miller, 891 F.2d 1265, 1272-73 (7th Cir.1989) (Easterbrook, J., concurring).[7]

The lack of any sound doctrinal basis for a "due process" defense has, in our view, led to unnecessary conflict in the courts of appeals where, although the courts are all-but-unanimous in their results, contradictory standards have evolved. Compare, e.g., *United States v. Chin*, 934 F.2d 393, 398 (2d Cir. 1991) ("whether investigative conduct violates a

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[6] The courts of appeals have not been completely docile regarding the so-called "due process" defense, however. There have been two efforts to restrict the defense, though neither has been consistently applied within its own circuit and neither has been expressly adopted by any court outside its own circuit. See United States v. Kelly, 707 F.2d 1460, 1476 & n.3 (D.C.Cir.) (defense should be limited to physical or extreme Psychological abuse of defendant), cert. denied, 464 U.S. 908, 104 S.Ct. 264, 78 L.Ed.2d 247 (1983), and United States v. Bogart, 783 F.2d 1428 (9th Cir.) (government conduct must be more than inducement, government must have "created" or "manufactured" the crime solely for the purpose of generating criminal charges), vacated in part on other grounds sub nom. United States v. Wingender, 790 F.2d 802 (9th Cir.1986).

[7] Judge Easterbrook's analysis of the validity of the "due process"defense concludes: When push comes to shove, we should reject the contention that the criminal must go free because the constable was too zealous. Why raise false hopes? Why waste litigants' and judges' time searching for and rejecting on the facts defenses that ought not exist as a matter of law? Everyone has better things to do.... "I know it when I see it" is not a rule of any kind, let alone a command of the Due Process Clause. Miller, 891 F.2d at 1272-74.

defendant's right to due process cannot depend on the degree to which the governmental action was responsible for inducing the defendant to break the law") (emphasis added) with *United States v. Gamble*, 737 F.2d 853, 858 (10th Cir.1984) ("defendant may not invoke the Due Process Clause ... unless the government's acts, no matter how outrageous, had a role in inducing the defendant to become involved in the crime") (emphasis added).

Moreover, the potential violation of separation of powers inherent in this "defense," coupled with the unavoidable subjectivity to which any purportedly objective assessment of "outrageousness" must devolve, has nowhere been as apparent as in the unseemly power struggle between the court of appeals and the district court in *United States v. Simpson*, 813 F.2d 1462 (9th Cir.1987), cert. denied, 484 U.S. 898, 108 S.Ct. 233, 98 L.Ed.2d 192 (1987). There, the Ninth Circuit Court of Appeals reversed the district court's dismissal of the indictment, holding that the government's conduct[8] "was not so outrageous as to justify dismissal of the indictment on due process grounds." *Id.* at 1465. The court remanded for further proceedings "consistent with" its opinion. *Id.* at 1473.

The district court, on remand, promptly dismissed the indictment again, this time as an exercise of its "supervisory powers." The Ninth Circuit again reversed. *United States v.*

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[8] In Simpson, the government used a false affidavit to get wiretaps, "manipulated" a prostitute who was drug addict and a fugitive from Canadian authorities into becoming an informant, continued using that informant even after learning that she was sleeping with the defendant, and used that informant even though the government knew she was continuing to use heroin and engage in prostitution. Simpson, 813 F.2d at 1465.

Simpson, 927 F.2d 1088, 1091 (9th Cir.1991). The court held that, although the supervisory power may be invoked to deter future illegal activity, such a justification was inapplicable because there had been no violation of the defendant's due process rights and because none of the illegal activities of the informant were done at the request of the government or in furtherance of governmental aims. *Id.* The court also held that, even if the government had broken the law (or, presumably, violated the defendant's due process rights), dismissal under the court's supervisory power would be an unconstitutional violation of separation of powers. Id. The court stated:

> Dismissing an indictment with prejudice encroaches on the prosecutor's charging authority, substituting a judicial wag-of-the-finger for the prosecutorial nod. Such an intrusion will be permitted only in cases of flagrant prosecutorial misconduct.... The conduct here was neither fairly attributable to the prosecutor nor sufficiently flagrant to justify dismissal with prejudice. *Id.* (emphasis added). Thus, the Ninth Circuit's two opinions in Simpson show that, when defendants raise the "due process" defense, it is the "wrong" which is illusory and the "remedy" sought which is, in fact, unconstitutional.

E. Conclusion

In sum, there is no binding Supreme Court authority recognizing a defense based solely upon an objective assessment of the government's conduct in inducing the commission of crimes. Nonbinding dicta of the Court, indicating that there may be such a defense, has been recanted by its author based upon reasoning later adopted by a majority of the Court in *Payner*, 447 U.S. at 737 n. 9, 100 S.Ct. at 2447 n. 9. Moreover, this court has recognized the availability of this defense only in dicta because, in every case in which the issue has been raised, the government's conduct has been held not to

have been "outrageous." The only case squarely holding that an objective assessment of the government's conduct in a particular case may bar prosecution without regard for the defendant's predisposition has been greatly criticized, often distinguished and, recently, disavowed in its own circuit.

III. Analysis

Based on the lack of binding precedent from either the Supreme Court or the Sixth Circuit, we are of the view that this panel is not required to recognize the "due process" (PAGE 1427 BEGINS) defense. Moreover, there are three strong reasons for concluding that such a defense simply does not exist: (1) government conduct which induces a defendant to commit a crime, even if labelled "outrageous," does not violate that defendant's constitutional right of due process; (2) the district court lacked authority to dismiss the indictment for governmental misconduct where no violation of an independent constitutional right has been shown; and (3) continued recognition of this "defense" stands as an invitation to violate the constitutional separation of powers, intruding not only on the province of the Executive Branch but the Legislative Branch as well.

A. Inducement Does Not Violate Due Process

The logical inconsistency underlying the assertion of a "due process" defense is apparent simply in restating the defendants' contention. They argue that it would be "fundamentally unfair" to convict them of a crime, even assuming that they were predisposed to commit that crime, because of the outrageous conduct of the government in inducing their actions. As noted above, however, the Supreme Court has held that the basis for the entrapment defense lies in congressional intent and, specifically, not in the Due Process Clause of the Fifth Amendment. *Russell*, 411 U.S. at 430-31, 93

S.Ct. at 1642. From this it must certainly follow that, if Congress were to reject entrapment as a defense, even defendants who were induced to commit a crime and who were not predisposed could be convicted without violating due process. If due process is not offended by convicting those who are not predisposed, a priori it is not offended by convicting those who are predisposed.

This is the inconsistency which Justice Rehnquist sought to avoid when, in *Hampton*, he rejected the defendant's "due process" defense and held that claims of inducement, outrageous or otherwise, must be analyzed under the law of entrapment. *Hampton*, 425 U.S. at 490, 96 S.Ct. at 1650. It is also the inconsistency which prompted this court to reject outright the first "due process" defense presented to it. See *Leja*, 563 F.2d at 247.

B. The District Court Has No Authority to Dismiss an Indictment on These Grounds

In *United States v. Payner*, 447 U.S. 727, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980), the district court set aside the defendant's conviction after ruling that evidence illegally seized from a third party's briefcase could not be admitted against the defendant. *Id.* at 730, 100 S.Ct. at 2443. Acknowledging the "standing" limitations on the Fourth Amendment exclusionary rule, the district court nevertheless excluded the evidence on the grounds of due process and its supervisory powers. *Id.* at 730-31, 100 S.Ct. at 2443-44. This court affirmed on the ground that exclusion was a proper exercise of the court's supervisory powers and did not reach the due process question. *Id.* at 731, 100 S.Ct. at 2444. The Supreme Court reversed.

The Court held that the requirement of "standing" vis-a-vis the Fourth Amendment exclusionary rule represented a balance of competing interests, i.e., the interest of society in

convicting criminals and the interest of society in deterring illegal searches. *Id.* at 733, 100 S.Ct. at 2445. This balance, the Court held, was not subject to case-by-case second-guessing by the lower courts in the guise of exercising their "supervisory power." *Id.* at 735-36, 100 S.Ct. at 2446-47.

The Court also held that the defendant could not prevail under a "due process" challenge because, even if we assume that the unlawful briefcase search was so outrageous as to offend fundamental " 'cannons of decency and fairness,' " *Rochin v. California*, 342 U.S. 165, 169 [72 S.Ct. 205, 208, 96 L.Ed. 183] (1952), quoting *Malinski v. New York*, 324 U.S. 401, 417 [65 S.Ct. 781, 789, 89 L.Ed. 1029] (1945) (opinion of Frankfurter, J.), the fact remains that "[t]he limitations of the Due Process Clause ... come into play only when the government activity in question violates some protected right of the defendant," *Hampton v. United States*, supra, 425 U.S., at 490 [96 S.Ct., at 1650] (plurality opinion). Id. at 737 n. 9, 100 S.Ct. at 2447 n. 9. This clear statement rejecting any "objective" assessment of the government's conduct, we believe, lays to rest whatever modicum of Russell 's dicta may have survived Hampton.

As discussed, defendants in the present case have not demonstrated a violation of their due process rights. Moreover, the Supreme Court, by repeated majority decision, has held that the balance between the desire to curb government inducement and the need to convict criminals is drawn at predisposition, not "outrageousness." The district court's dismissal in this case flaunts that balance.

C. "Due Process" Defense Violates Separation of Powers

It is not difficult to label as "outrageous" any conduct of the Executive Branch that "creates" or induces more crime than that with which society must already contend. That is not the

issue. The issue has always been: What to do about this conduct and which branch of the government should do it? Clearly, the Executive Branch is primarily responsible for, and answerable to the electorate for, its own conduct. In addition, the Executive Branch is constrained by "applicable constitutional and statutory limitations and [by] judicially fashioned rules to enforce those limitations." *Russell*, 411 U.S. at 435, 93 S.Ct. at 1644.

With regard to acts of inducement, the Legislative Branch has implicitly curbed the Executive Branch by intending, as an implied part of each criminal statute, that no conviction may be had against one who was induced by the government to commit a crime unless the government proves, beyond a reasonable doubt, that the defendant was predisposed to commit that crime. *Jacobson v. United States,* --- U.S. ----, ----, 112 S.Ct. 1535, 1540, 118 L.Ed.2d 174 (1992). Thus, a defendant's subjective predisposition marks the point at which society's interest in preventing governmental overreaching is outweighed by society's interest in punishing those who commit crimes, not the objective character of the government's conduct.

This line, established by Congress and articulated by the Supreme Court beginning in Sorrells, is not subject to circumvention on a case-by-case basis. The mere invocation of the phrase "due process" does not give the courts license to conduct its own "oversight" of police practices. Where no law has been broken and none of the defendants' constitutional rights have been violated, the court's focus must remain where Congress has directed it, i.e., on the defendants' subjective predisposition.

Finally, because entrapment and predisposition are ordinarily questions for the jury, *Mathews v. United States*, 485 U.S. 58, 63, 108 S.Ct. 883, 887, 99 L.Ed.2d 54 (1988), the line

drawn by Congress and articulated by the Supreme Court ensures that the jury, as the traditional "defense against arbitrary law enforcement," *Duncan v. Louisiana*, 391 U.S. 145, 156, 88 S.Ct. 1444, 1451, 20 L.Ed.2d 491 (1968), operates as the ultimate check on abuses of executive power.

For the reasons just discussed, therefore, we hold that a defendant whose defense sounds in inducement is, by congressional intent and Supreme Court precedent, limited to the defense of entrapment and its key element of predisposition. Defendants may not circumvent this restriction by couching their defense in terms of "due process" or "supervisory powers." Thus, we reject as a matter of law the theory upon which defendants based their motion to dismiss without regard to the particular facts of their case and without reaching the issue of whether or not those facts can properly be characterized as "outrageous."

IV. Entrapment as a Matter of Law

To ensure that nothing we have said above is taken as having expressed an opinion as to defendants' claim of entrapment, we address that issue now. The defendants' motions to dismiss raise both the "due process" defense and entrapment as a matter of law. To warrant dismissal before trial on the ground that the defendant was entrapped as a matter of law, this court has held that "the undisputed evidence must demonstrate a 'patently clear' absence of predisposition." *United States v. Harris*, 9 F.3d 493, 498 (6th Cir.1993) (quoting Barger, 931 F.2d at 366).

In the present case, although it was not necessary to reach the issue because of the disposition of the "due process" defense, the magistrate judge stated that because of the defendants' "willingness to participate in this scheme, it is not

likely that the defendants would be able to mount a successful entrapment defense." (J.A. at 59.) The district court further noted that "but for the finding of the Magistrate [regarding the "due process" defense] and the concurrence of this Court in that finding, it is doubtful that any defense of entrapment would prevent you from being found guilty on those offenses." (J.A. at 172.) The district court concluded, however, that entrapment "is something that a jury would have had to determine." *Id.* (emphasis added).

We believe the district court and the magistrate judge were correct to conclude that the question of entrapment in this case should be left to the jury. The evidence in the record before us, taken in the light most favorable to the government, is neither "undisputed" nor "patently clear" regarding whether these defendants were predisposed to commit their crimes. Therefore, the question must be resolved by the jury.

V.

The district court's dismissal of the defendants' indictment is, for the reasons discussed above, REVERSED and this case is REMANDED for trial.

BOYCE F. MARTIN, JR., Circuit Judge, concurring in the result.

While I agree in principle with much of the majority's analysis, I believe that this panel is bound by prior Sixth Circuit decisions recognizing the existence of an "outrageous government conduct" defense, under the Due Process Clause of the Fifth Amendment, to criminal prosecution. I concur in the result, nevertheless, because the government's conduct in the present case was not outrageous.

As the majority correctly observes, this Circuit has decided more than two dozen cases involving an "outrageous

government conduct" defense, rejecting it in each instance on the facts. In *United States v. Barger*, 931 F.2d 359, 363-64 (6th Cir.1991), we reiterated four factors that must be weighed in determining whether governmental conduct is outrageous:

(1) the need for the police conduct as shown by the type of criminal activity involved, (2) the impetus for the scheme or whether the criminal enterprise preexisted the police involvement, (3) the control the government exerted over the criminal enterprise, and (4) the impact of the police activity on the commission of the crime.

In *Barger* and *United States v. Payne*, 962 F.2d 1228, 1231-33 (6th Cir.), cert. denied, --- U.S. ----, 113 S.Ct. 306, 121 L.Ed.2d 229, and cert. denied, --- U.S. ----, 113 S.Ct. 811, 121 L.Ed.2d 684 (1992), our most recent published opinions involving this defense, we engaged in a lengthy analysis of each factor under the circumstances of the particular case. This analysis was undertaken, in both instances, in a separate section of the opinion devoted solely to the briefed and argued issue of outrageous government conduct, and not simply in a passing statement or cursory, superfluous commentary. Accordingly, I cannot agree with the majority's characterization of this repeated treatment as dicta.[9] It seems clear to me that this

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[9]Black's Law Dictionary defines dictum as follows:
The word is generally used as an abbreviated form of obiter dictum, "a remark by the way;" that is, an observation or remark made by a judge in pronouncing an opinion upon a cause, concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the case or essential to its determination; any statement of the law enunciated by the court merely by way of illustration, argument, analogy, or suggestion. Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to

Circuit has recognized outrageous government conduct as a valid due process defense, and, as the majority concedes, the Supreme Court has not clearly held otherwise. My disagreement with the majority opinion on this point notwithstanding, I concur in the remand for trial on the entrapment issue because I believe that the government's conduct in the present case was not outrageous.

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determination of the case in hand are obiter dicta, and lack the force of an adjudication. Dicta are opinions of a judge which do not embody the resolution or determination of the court, and made without argument, or full consideration of the point, are not the professed deliberate determinations of the judge himself. Black's Law Dictionary 409 (5th ed.1979) (emphasis added) (internal citation omitted).

APPENDIX B

No. 93-6028

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v. ORDER

BRENDA TUCKER; BARBARA MCDONALD,
Defendants-Appellees.

(Filed August 26, 1994)

BEFORE: MARTIN, SUHRENREICH, and SILER, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing had been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is

denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs. No. 92-20259-TU-BRO

BRENDA TUCKER, AND
BARBARA McDONALD,
Defendants.

REPORT

(Filed April 6, 1993)

The defendants in this case are charged with acquiring food stamps in a manner not authorized by the Food Stamps Act. Both Ms. Tucker and Ms. McDonald ar charged with receiving $400 in food stamps in exchange for $200 in cash on or about November 16, 1990. Ms. McDonald is charged with another defendant, Jean Chism, with receiving $200 in food stamps in exchange for $100 in cash, also on November 16, 1990. Ms. McDonald is charged with another transaction on the same day involving the receipt of $100 in food stamps for $40 in cash. She is charged with receiving $50 in food stamps for $25 in cash on December 7, 1990. Finally, the defendant

Brenda Tucker is charged with receiving $130 in food stamps in exchange for a $60 personal check on December 7, 1990.

Both Defendants have filed motions to dismiss, claiming that the government engaged in such outrageous conduct as to deny them due process of law. Alternatively, they maintain that they were entrapped as a matter of law. I held an evidentiary hearing on these motions on January 27, 1993. The matter was held in abeyance for counsel to undertake to agree on a transcript of certain taped conversations between the defendants and a government agent. No such transcript was produced, and both sides have announced that they do not wish to file such a transcript. On the defendants' motions, I conducted a supplemental hearing on March 30, 1993. A transcript of the January 27th hearing has been prepared, and a transcript of the March 30th hearing has been ordered. From the hearings, I find the following facts.

Linda Hancock was hired by Clifford White, an agent of the United States Department of Agriculture, as an undercover operative to sell food stamps. Ms. Hancock had previously worked for the Shelby County Criminal Justice Center and was put in contact with Mr. White by a police officer relative of her. White furnished Hancock food stamps issued by the Department of Agriculture and instructed Ms. Hancock to sell them. Ms. Hancock was to be paid half the amount she sold the stamps for. If she sold stamps for $200, she was to receive $100. She was to be paid for her mileage incurred in trying to sell stamps

even if she did not sell any. Ms. Hancock was to find the buyers of the food stamps on her own and record conversations between the buyers and herself. She was given no instructions as to how to find buyers for the stamps. Ms. Hancock did testify that she was told by Mr. White not to force individuals to buy food stamps. (Tr. 63-64). Mr. White did not testify.

The defendant Brenda Tucker owned and operated a beauty salon in Memphis. The defendant Barbara McDonald was an employee of hers. Linda Hancock and Brenda Tucker were personal friends. They were next door neighbors from around 1982 until the late 80's. After that, they maintained contact with one another and remained friends. Ms. Hancock had some health, domestic, and employment problems that she shared with Ms. Tucker. In November of 1990, Ms. Hancock contacted Ms. Tucker at Tucker's beauty salon and told Tucker that she, Hancock, was in such dire financial need that her children would not have a proper Christmas. When she came to Ms. Tucker's shop, Ms. Hancock was dressed in a manner that indicated she was in serious financial need. Using this ruse, she persuaded Ms. Tucker to buy food stamps that had been furnished to her by Mr. White. These are the transactions that Ms. Tucker is charged with in this case.

Most of the facts are not in dispute. However, there is a dispute as to whether Ms. Hancock played on Ms. Tucker's sympathy, as stated above, to get Tucker to buy the food stamps. Hancock said that she presented

herself in a normal manner and did not represent to Ms. Tucker that she was in financial need. I believe Ms. Tucker's version. This is in part based on the demeanor of the witnesses at trial, including the demeanor of Ms. Hancock. Further, at the supplemental hearing, Renee Sumler, who has pled guilty to purchasing food stamps, testified credibly that, when she was approached by Ms. Hancock, Ms. Hancock was dressed in a manner that made it appear as though she was in financial straits.

Ms. Tucker purchased the food stamps from Ms. Hancock and put Hancock in touch with the defendant, Barbara McDonald. Ms. Hancock made representations to Ms. McDonald that she, Hancock, was sick and that she and her family had some food stamps she was going to have to sell in order to provide for her children's Christmas. I believe Ms. McDonald's testimony in that regard. Ms. McDonald likewise bought food stamps from Ms. Hancock.

As the Court noted in United States v. Barger, 931 F.2d 359 (6th Cir. 1991),

> [t]he Sixth Circuit has articulated four factors for determining if governmental conduct is outrageous: (1) The need for police conduct as shown by the type of criminal activity involved, (2) the impetus for the scheme or whether the criminal enterprise pre-existed the police involvement, (3) the control the government exerted over the criminal enterprise, and (4)

> the impact of the police activity on the commission of the crime. United States v. Robinson, 763 F.2d 778, 785 (6th Cir. 1985); Norton [United States vs. Norton, 700 F.2d 1075 (6th Cir.), cert. den. 461 U.S. 910 (1983)], 700 F.2d at 1075; Brown [United States v. Brown, 635 F.2d 1207 (6th Cir. 1980)], 635 F.2d at 1212-13. Since these are factors for consideration, not mandatory prongs in a test, every one need not be shown.

931 F.2d at 363. I will attempt to analyze the facts of this case in relation to this test.

The first factor the Court must consider is the need for the government conduct in light of the type of criminal activity involved. The record is totally devoid of any evidence establishing a need for the government to send Ms. Hancock to sell food stamps to her friends and acquaintances and thus create crimes. There is no evidence, or indication, that Ms. Tucker or Ms. McDonald ever bought any food stamps or engaged in any illegal activity remotely similar to that.

Ms. Hancock testified that she thought Ms. Tucker would be a good subject because Ms. Tucker had had a shoplifting conviction several years before. She also said that she thought that Ms. Tucker had possessed some stolen coats in her house at one time. Ms. Tucker's shoplifting conviction was some sixteen years before these offenses. She testified credibly at the hearing that she ran

a legitimate merchandising operation at one time in which she sold coats. In any event, there is no evidence that Ms. Hancock or any government agent had any information concerning a propensity on the part of Ms. Tucker or Ms. McDonald to purchase food stamps or that the defendants had engaged in such activity in the past. Counsel for the United States stated in her memorandum that, "the investigative operative [Linda Hancock] had knowledge that the defendant had purchased food stamps in the past." The evidence does not support that statement.

The second factor to consider is the impetus for the scheme or whether the criminal enterprise pre-existed the police involvement." The impetus for the scheme appears simply to have been a desire by the government to lure anyone into committing the crime of buying food stamps. Neither Ms. Tucker nor Ms. McDonald were engaged in any criminal enterprise prior to being approached by Linda Hancock.

The third factor the court must consider is the control the government exerted over the defendants' purchase of the food stamps. The government exercised compete control over this crime. Ms. Hancock picked Ms. Tucker out because Ms. Tucker was a personal friend. Ms. McDonald was drawn into the scheme because of her relationship with Ms. Tucker. There is no indication that either Ms. Tucker or Ms. McDonald were even contemplating the purchase of food stamps prior to Ms. Hancock's arrival. Ms. Hancock came, with her tales of woe, and induced both women to buy the stamps. Ms.

Hancock delivered them and received a cut of the proceeds for inducing her friend and neighbor and her friend's employee to commit crimes.

The fourth factor--impact of the police activity on the commission of the crime--is intricately related to the third factor. It was Ms. Hancock's activity on behalf of the Department of Agriculture that brought about the commission of the crime of purchasing food stamps. There is no indication that the crimes would have been committed but for Ms. Hancock's activities.

Because of their willingness to participate in this scheme, it is not likely that the defendants would be able to mount a successful entrapment defense. See, United States vs. Kussmaul, ___ F.2d ___, 1993 WL 38100 (6th Cir. Docket No. 92-3314, decided Feb. 18, 1993). There are cases, however, in which the government conduct is so opprobrious that they should not be permitted to proceed without regard to the question of entrapment. That is apparently the reason why courts have, from time to time, permitted an outrageous conduct/due process defense even though a defendant's conduct would preclude an entrapment defense. See, Gail M. Greaney, Note, Crossing the Constitutional Line: Due Process and the Law Enforcement Justification, 67 Notre Dame L. Rev. 745 (1992).

I believe that this case is one that should be dismissed without regard to the defendants' ability to mount an entrapment defense. We are not here dealing with an effort by a government agent to trap someone he

suspected of committing a crime. What we have instead is a government agent hiring a person, on a percentage contract, to go out and induce anyone she chose, including personal friends, to violated the law. I believe this conduct goes far beyond the bounds of propriety and should not be countenanced.

I, therefore, recommend that the defendants' motions to dismiss be granted.

This the 6th day of April, 1993.

/s/ Aaron Brown, Jr.
AARON BROWN, JR.
MAGISTRATE JUDGE

NOTICE

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN TEN DAYS FROM THE DATE OF THE REPORT. FAILURE TO FILE THEM WITHIN TEN DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS AND FURTHER APPEAL.

[illegible]
/s/ M. Thomas
DEPUTY CLERK

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs. No. 92-20259-TU

BRENDA TUCKER, AND
BARBARA McDONALD,
Defendants.

JUDGMENT

(Filed June 24, 1993, 3:24 p.m.)

Decision by Court. This action came for consideration before the Court. The issues have been duly considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this action is dismissed as to defendants Brenda Tucker and Barbara McDonald in accordance with the Order On Exception to Magistrate Judge's Report On Motions To Dismiss Indictment docketed on June 3, 1993.

APPROVED

/s/ Jerome Turner [illegible]
JEROME TURNER BY: /s/ M. Thomas

UNITED STATES DISTRICT JUDGE

DEPUTY CLERK

6-24-93
DATE

ROBERT DITROLIO
CLERK

/s/ Earline Grayer
(By) DEPUTY CLERK

APPENDIX E

TRANSCRIPT EXCERPT

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs. No. 92-20259-TU

BRENDA TUCKER, AND
BARBARA McDONALD,
Defendants.

Before the Honorable Jerome Turner

For the plaintiff: Ms. Vivian Donelson
For the defendant Tucker: Mr. William D. Massey
For the defendant McDonald: Mr. Robert C. Brooks

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believe the case agent's testimony would offer much on the really pertinent facts. The credibility differences turned in large part on the testimony of the tow defendants and the confidential informant. And without second guessing the magistrate, it is pretty obvious that he didn't accept many of the conclusions and some of the testimony offered by the case agent.

I have also concluded that non, no one of the facts that were hotly contested, and some of which were not contested, when taken singularly, is sufficient to hold that the conduct of the case agent -- that particular piece of conduct -- shocking to the universal sense of justice that seems to be a standard measure of whether or not a motion of this type should be granted. But given the facts as they were found by the Magistrate Judge who held the hearings in this case, when taken in their totality and measured by the Barter (sic) standard, which both of you have argued, or all three of you have argued to the Court in some detail, the totality of those facts reflect a shocking invasion, in my view, by a hired confidential informant who was working for the government apparently on a contingency fee basis, as determined by the Magistrate, who elected by reason of the freedom given to her by her case agent to delve into the private lives of ordinary people who were not otherwise suspected of any wrong doing. And while I recognize that the police and investigative agencies have to have great leeway to investigate crime and to go undercover, I do not think that the kind of investigatory conduct that took place in this case is acceptable conduct under the due process clause.

The confidential agent went to a neighbors -- a former neighbor and friend. She used, given the findings of the Magistrate, sympathetic reasons of ill health and deprived children. And she alone initiated the opportunity for this crime to occur and initiated it through ruses and with those friends, who I point out again with some

emphasis, were people that were not suspected by the government of having been involved in criminal trafficking for food stamps.

In the Barter (sic) case much more serious ramifications of criminal conduct were expected by the government with good cause. And it was reasonable to believe that those people who were being interacted with undercover were dangerous and might respond in injurious and even murderous ways. In this case, given the record that was presented to the Magistrate and as he found those facts to be, there is simply no evidence that these people were suspected of having been involved in any trafficking. They were just ordinary people who were approached by a confidential informant working on a contingency fee basis that was a friend of --in Mrs. Tucker's case was a friend and who used sympathetic ruses, as I said, about her health and her children.

I don't think we are at a point in our criminal history where the government needs to lower itself into targeting sympathetic ploys on citizens that are not otherwise suspected of engaging in criminal conduct, particularly when some of the conduct that the Magistrate found to be true was used in sympathetic ploys. It is true that drug trafficking -- excuse me -- food stamp trafficking is a serious offense. But it is nothing like the offense and the possibility of injury that was involved in Barter (sic). It is not such a terrible offense that the government, in my view, should be permitted to use agents under the totality of the facts of this case. And I emphasis (sic) that too. It

is the totality of the facts in this case that have convinced me that the conduct has gone beyond the due process limitations. It is not any one of the facts, as I have said. And certainly there is no reason why the government cannot use undercover agents, cannot pay those undercover agents, cannot have undercover agents deal with friends, cannot use untrue ploys. All of those things individually are certainly useful techniques for investigation. But when they are employed in totality with people who are not otherwise suspected of engaging in crime, it seems to me that the conduct, as the Magistrate concluded, crosses that boundary.

I will add that the facts in the case show that both of you violated the law without much question, insofar as I have gained the facts from the transcript presented to the Magistrate. And but for the finding of the Magistrate and the concurrence of this Court in that finding, it is doubtful that any defense of entrapment would prevent you from being found guilty on those offenses. That is something that a jury would have had to determine. But the government's conduct does not justify what you did. It merely gives you some protection in this one single instant (sic). And It may be that the government doesn't agree with that and will take it to the Sixth Circuit and see whether that stands or not.

In short, I am going to grant the motion to dismiss.

MR. BROOKS: Thank you, Your Honor.

MR. MASSEY: Thank you, Your Honor.

THE COURT: Any questions?

MS. DONELSON: I assume the Court is going to enter a written order.?

THE COURT: I will enter a written order. I do not intend to write an opinion, simply a matter of time. You can have these remarks written up as the Court's. . .

APPENDIX F

WESTLAW: CTA
1994 WL 509047

1994 WL 509047 (9th Cir.(Cal.)), 63 USLW 2190

UNITED STATES of America, Plaintiff-Appellee,

v.

Jose Teofilo SOLORIO, Defendant-Appellant.

UNITED STATES of America, Plaintiff-Appellee,

v.

Bourne Bobby THOMAS, Defendant-Appellant.

Nos. 93-50507, 93-50508.
United States Court of Appeals,
Ninth Circuit.
Argued and Submitted Aug. 2, 1994.
Decided Sept. 20, 1994.

Defendants were convicted of conspiracy to sell methamphetamine, in the United States District Court for the Southern District of California, Irma E. Gonzalez, J. Defendants appealed. The Court of Appeals, D.W. Nelson, J., held that: (1) conviction of one defendant was required to be reversed, as government had used outrageous conduct in setting up drug purchase; (2) evidence was sufficient to convict another defendant who

lacked standing to raise outrageous conduct point; and (3) prosecutorial misconduct did not require reversal of conviction of second defendant.

Reversed in part, affirmed in part.

U.S. v. Solorio

[1]

110 CRIMINAL LAW

110XXIV Review

110XXIV(L) Scope of Review in General

110k1139 k. Additional proofs and trial de novo.

C.A.9 (Cal.),1994.

Court of Appeals reviews de novo district court's refusal to dismiss indictment on basis of outrageous government conduct.

U.S. v. Solorio

[2]

110 CRIMINAL LAW

110II Defenses in General

110k36.5 Official Action, Inaction, Representation, Misconduct, or Bad Faith

110k36.6 k. In general.

C.A.9 (Cal.),1994.

Member of conspiracy, whose sole role was to transport controlled substance to point where sale would take place, lacked standing to claim that government's conduct in bringing about sale was outrageous.

U.S. v. Solorio
[3]
110 CRIMINAL LAW
110II Defenses in General
110k36.5 Official Action, Inaction, Representation, Misconduct, or Bad Faith

110k36.6 k. In general.
C.A.9 (Cal.),1994.
Allegation of "outrageous government conduct" differs from entrapment defense in that (1) technically, outrageous conduct claim is not defense, and if successful results in dismissal of indictment, and (2) if government's conduct is found to be outrageous, defendant's predisposition to commit crime is irrelevant.
See publication Words and Phrases for other judicial constructions and definitions.
U.S. v. Solorio
[4]
110 CRIMINAL LAW
110II Defenses in General
110k36.5 Official Action, Inaction, Representation, Misconduct, or Bad Faith

110k36.6 k. In general.
C.A.9 (Cal.),1994.
Government engaged in outrageous conduct, requiring

reversal of convictions for drug selling; government had recruited childhood friend of one member of drug conspiracy to ask for drugs, promising friend compensation based upon number of convictions and amount of drugs obtained, rather than upon information provided, and had then provided assistance in development of "sting" operation. U.S.C.A. Const.Amend. 14.

U.S. v. Solorio

[5]

91 CONSPIRACY

91II Criminal Responsibility

91II(B) Prosecution

91k44 Evidence

91k47 Weight and Sufficiency

91k47(3) Particular Conspiracies

91k47(12) k. Narcotics and dangerous drugs.

C.A.9 (Cal.),1994.

Evidence supported conviction of defendant for conspiracy to participate in drug transaction, as driver of truck which had been used to transport methamphetamine to point of sale, even though he was not observed exiting vehicle in which drugs were found; at time of his arrest at nearby drug store defendant smelled of methamphetamine and was carrying keys to truck.

U.S. v. Solorio

[6]

110 CRIMINAL LAW

110XXIV Review

110XXIV(Q) Harmless and Reversible Error
110k1171 Arguments and Conduct of Counsel
110k1171.8 Presentation of Evidence

110k1171.8(1) k. In general.
C.A.9 (Cal.),1994.
Defendant drug sale conspirator was not entitled to reversal of conviction, even though he claimed that prosecutor had engaged in misconduct by misrepresenting evidence, instructed jury on legal theory on which district court had refused to instruct, asked leading questions to most of government witnesses, misrepresented postarrest statement and impermissibly referred to postarrest silence in closing argument, and repeatedly asked defense witnesses argumentative and prejudicial questions; it was more probable than not that misconduct had not materially affected verdict.

Thor O. Emblem, Escondido, CA, for defendant-appellant Bourne Bobby Thomas.

Russell S. Babcock, San Diego, CA, for defendant-appellant Jose Teofilo Solorio.

Sherri L. Walker, Asst. U.S. Atty., San Diego, CA, for plaintiff-appellee U.S.

Appeal from the United States District Court for the Southern District of California.

Before: D.W. NELSON and NOONAN, Circuit Judges, and KING, [FN*] District Judge.

D.W. NELSON, Circuit Judge:

OVERVIEW

*1 Defendants-Appellants Jose Teofilo Solorio and Bourne Bobby Thomas were convicted of conspiring to sell methamphetamine and were sentenced to 121 months in prison. Their appeals were consolidated. Both Thomas and Solorio maintain that the government's conduct in this case was so outrageous as to violate due process. We agree. Accordingly, we reverse Thomas's conviction. Solorio, however, lacks standing to raise the outrageous government conduct claim and his other claims lack merit. Therefore, we affirm Solorio's conviction.

FACTUAL AND PROCEDURAL BACKGROUND

Cristobal Crosthwaite-Villa's car had been seized by immigration officials as he was trying to cross the Mexican border illegally. Shortly thereafter, while Crosthwaite was in Tijuana trying to get his car back, he ran into his childhood friend, Albert Barruetta, a Mexican national living in Tijuana. Unbeknownst to him, Barruetta had become a professional informer for American DEA agents. Barruetta told Crosthwaite that for $1,000 he could get the seized car back and that he also could get him, illegally, a permit to live in the U.S. Crosthwaite accepted the offer and gave Barruetta $400 as a down payment.

During the following weeks, Crosthwaite repeatedly contacted Barruetta to talk about the car and his immigration problem. In the course of these conversations, Barruetta learned that Crosthwaite was a

drug user. At trial, Barruetta testified that he could not recall discussing whether Crosthwaite had ever been involved in drug dealing or whether he would be willing to do so in the future. On several occasions, Barruetta illegally crossed the border to the United States in order to purchase rock cocaine to smoke with Crosthwaite.

On November 5, 1992, Barruetta met with DEA Agent Bruce Goldberg and told him that he knew an individual who was a major drug dealer and who could arrange for the purchase of methamphetamine. Without verifying the accuracy of the information, Agent Goldberg formally enlisted Barruetta as a confidential informant and directed him to pursue his lead. As in the past, Barruetta's financial agreement with the government was on a contingency basis. Under the agreement, the amount of money Barruetta would be paid depended on whether the operation resulted in conviction, on the amount of drugs involved, and on the value of the assets seized. If, however, the operation was "unsuccessful," Barruetta would be paid only the minimum wage for his services. Barruetta eventually was paid $2,000 for his contribution in this case, and thus far has earned more than $50,000 for his services as an informant. Just before the drug transaction occurred, Barruetta told Gilbert Hinojosa, one of the DEA Agents involved in this deal: "We'll see if this goes through, son of a bitch, I need some cash. I practically don't have tires left, son of a bitch." [2 AM R.T. at 326].

When Crosthwaite agreed to obtain methamphetamine

for Barruetta, he contacted Bobby Thomas for help. Although Crosthwaite did not consider Thomas to be a drug dealer, he knew that Thomas was a drug user and that in the past he occasionally had sold Crosthwaite $20 dosages of methamphetamine. Crosthwaite asked Thomas to help him find two or three pounds of methamphetamine. Barruetta met with Thomas on several occasions. As an incentive to participate in the drug deal, Barruetta offered Thomas some marijuana and cocaine, which Thomas did not accept. After some reluctance, Thomas agreed to participate in the drug sale. Thomas was not expecting to make any money from this transaction, but agreed to go along with Barruetta's plan in order to help his friend Crosthwaite. Thomas made clear that he did not want to speak with Barruetta unless Crosthwaite was present, and insisted that he would not participate in the transaction unless accompanied by Crosthwaite.

*2 Finally, a deal was arranged for December 2, 1992. Barruetta informed the DEA agents that Thomas and Crosthwaite would sell three pounds of methamphetamine in exchange for $25,000. On December 2, 1992, the deal did not take place. Thomas and Crosthwaite had told Barruetta that the drugs were supposed to be delivered by a third party who was driving in from Escondido. On December 2, 1992, after waiting for about two hours, Agent Hinojosa decided to postpone the deal to the next day. It is undisputed that, until December 3, 1992, the day the deal actually took place, no one had mentioned

Solorio's name.

Although there is a factual dispute regarding the events that took place on December 3, 1992, as soon as the drugs were delivered to Thomas, the DEA Agents arrested Thomas and Crosthwaite and, subsequently, Solorio, who had delivered the drugs to Thomas.

DISCUSSION

I. Outrageous Government Conduct

[1] Thomas and Solorio contend that the government's activities were so outrageous as to violate due process. We review de novo the district court's refusal to dismiss the indictment on the basis that the government's conduct was not outrageous. United States v. Garza-Juarez, 992 F.2d 896, 903 (9th Cir.), cert. denied, --- U.S. ----, 114 S.Ct. 724, 126 L.Ed.2d 688 (1993). All underlying factual findings must be accepted as true unless clearly erroneous. United States v. Bogart, 783 F.2d 1428, 1434 (9th Cir.1986). [FN1]

[2] At the outset, we must determine whether Solorio has standing to raise the outrageous government conduct claim. The government claims that the district court erred in concluding that, as a member of the conspiracy, Solorio has standing to bring this claim. We agree.

In United States v. Emmert, 829 F.2d 805 (9th Cir.1987), the court held that one of the conspirators in that case "lacked standing to object to the government's activities ... [because] he was never an actual target in the conspiracy." Id. at 811. Thus, it is not true, as the district court assumed, that all members of a conspiracy have standing

to object to government activities targeted at the conspiracy. Solorio concedes that during the three months of discussions between Crosthwaite, Barruetta, the federal agents and Thomas, Jose Solorio's name was never mentioned, nor was he seen by the agents before December 3, 1992. In light of Solorio's concession and the holding in Emmert, 829 F.2d at 811, we conclude that Solorio lacks standing to raise the outrageous government conduct claim. It is undisputed, however, that Thomas has standing to raise the claim and, accordingly, we proceed to the merits.

The prohibition against outrageous government conduct is a prophylactic rule that enables the courts to exercise a supervisory role over the government's activities and to ensure that the executive branch carries out its tasks in a lawful manner. What activity amounts to outrageous conduct, of course, is not easily defined. As the Bogart court explained, the Supreme Court's attempts to give a more definite meaning to the term "outrageous conduct," using terms such as "fundamentally unfair" or "shocking to the universal sense of justice," United States v. Russell, 411 U.S. 423, 431-32, 93 S.Ct. 1637, 1642-43, 36 L.Ed.2d 366 (1973), only highlight the fact that what constitutes outrageous conduct is "indefinable." 783 F.2d at 1435. However, it is also important to recognize that "[t]he faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed." Rochin v. California, 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952). Thus, our inquiry

must not be "ad hoc and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society." Id.

*3 Exercise of this supervision is not some Olympian task, performed by those remote from the process being supervised. That process has as its point and purpose the obtaining of a conviction before a federal judge and a sentence imposed by a federal judge. The judge is indispensable, a necessary co- operator if the informer's plan is to work. The judge cannot pretend to be uninvolved. The judge must either repudiate the unwholesome scheme or ratify it by participating in its climax.

[3] An allegation of outrageous government conduct is different from an entrapment defense in at least two respects: (1) technically, it is not a defense and, if successful, results in the dismissal of the indictment, Bogart, 783 F.2d at 1432, n. 2, and (2) if the government's conduct is found to be outrageous, the defendant's predisposition to commit the crime is irrelevant. Id. at 1433. The reason that the defendant's predisposition is not relevant to a determination of whether the government's conduct was outrageous, is that the purpose of the doctrine is to punish and deter government abuse of power. In Greene v. United States, 454 F.2d 783 (9th Cir.1971), the Ninth Circuit established that when the government engages in outrageous conduct, the resulting conviction must be reversed. See also Bogart, 783 F.2d at 1432 ("[w]e have repeatedly held that the due process

outrageous conduct defense 'survived the Court's review' ") (citing cases); United States v. Batres-Santolino, 521 F.Supp. 744
(N.D.Cal.1981) (dismissing indictment on the basis of outrageous government conduct); United States v. Twigg, 588 F.2d 373 (3d Cir.1978) (same); United States v. Lard, 734 F.2d 1290 (8th Cir.1984) (dismissing the indictment on the ground of entrapment, but suggesting that the government's conduct would have satisfied the higher outrageous conduct standard).

[4] To determine whether the kind of activity engaged in by the government in this case is sufficiently unconscionable to require the court's intervention, we must balance the government's need to engage in this type of operation in order to stop drug trafficking, the benefits of the activity, and the costs both to the individual and to society at large of the operation.

As the Supreme Court explained in Rochin, although the determination of what constitutes outrageous government conduct necessarily requires courts to make a normative judgment, it is also important that we not apply our "merely personal and private notions and disregard the limits that bind judges in their judicial function." 342 U.S. at 170, 72 S.Ct. at 208. Instead, we must explain how the conduct at issue raises due process concerns. See, e.g., Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 28-40, 111 S.Ct. 1032, 1048-55, 113 L.Ed.2d 1 (1990) (Scalia J. concurring); see also Stanford v. Kentucky, 492 U.S. 361, 370, 109 S.Ct. 2969, 2975, 106 L.Ed.2d 306

(1989). Finally, "[e]ven though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process." Id. The Ninth Circuit
repeatedly has recognized this constraint in applying the outrageous government conduct doctrine. United States v. Simpson, 813 F.2d 1462 (9th Cir.), cert. denied, 484 U.S. 898, 108 S.Ct. 233, 98 L.Ed.2d 192 (1987). See also, United States v. Penn, 647 F.2d 876, 880-84 (9th Cir.) (en banc), cert. denied, 449 U.S. 903, 101 S.Ct. 276, 66 L.Ed.2d 134 (1980).

*4 Thomas contends that the government's exploitation of the friendship between Barruetta and Crosthwaite and that between Crosthwaite and himself amounted to outrageous government conduct. This argument has some merit. As noted above, however, the Ninth Circuit has held that the government is permitted to exploit intimate relationships. Therefore, if that were the only basis for Thomas' outrageous conduct claim, we would have to reject it. Thomas's central contention, however, is that the confidential informant, who essentially developed the crime, was paid a fee contingent upon conviction. The amount of Barruetta's fee was based on the rate of conviction, the amount of drugs involved, and the value of the assets seized. It was not based on the amount of information provided. This type of arrangement creates perverse incentives for confidential informants. Here, these incentives were compounded by the fact that the confidential informant was the choreographer of the

crime. In such circumstances, there is too great an incentive for informants to fabricate evidence and to maximize the amount of drugs involved. When an informant is given the authority to develop the crime and his remuneration depends on whether the defendants are convicted and on the quantity of the drugs involved, it is extremely likely that innocent people will be prosecuted and convicted, and that informants will induce defendants to sell greater quantities of drugs than they are predisposed to sell.

It is undisputed that the government has a strong interest in controlling illegal drug trafficking. It also has been established that, in achieving this legitimate goal, the government may engage in "sting operations" and may use informants. Within certain limits, it is permissible for the government to accord benefits, including monetary rewards, to informants in exchange for information regarding drug trafficking and other crimes. See, e.g., U.S.S.G. s 5K1.1 (providing that a departure may be warranted when a defendant provides "substantial assistance in the investigation or prosecution of another" defendant) (emphasis supplied).

This case is different. Here the informant's contingency fee agreement was based not on how much information he would provide, but on whether the people targeted would be convicted, on the quantity of the drugs involved, and on the value of the assets seized. It is hard to understand why the government would enter into an agreement in which the informant's remuneration is based on the

number of convictions obtained. The government has a legitimate interest in discovering information regarding drug trafficking. Sometimes, that information will be inculpatory and thus lead to a conviction. Convicting individuals who engage in criminal activities, however, is the means by which the government controls crime. The government has an equally strong interest in ensuring that the innocent are not convicted. See, e.g., Patterson v. New York, 432 U.S. 197, 208, 97 S.Ct. 2319, 2326, 53 L.Ed.2d 281 (it is "a fundamental determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.") (quoting In re Winship, 397 U.S. 358, 372, 90 S.Ct. 1068, 1077, 25 L.Ed.2d 368 (1970) (Harlan J., concurring). By creating a monetary incentive for informants to maximize convictions, the government appears to have made the means to a legitimate end the end itself. This is impermissible.

*5 "Our cases reflect 'continual insistence upon respect for the teachings of history [and] solid recognition of the basic values that underlie our society.' " Michael H. v. Gerald D., 491 U.S. 110, 122-23, 109 S.Ct. 2333, 2342, 105 L.Ed.2d 91 (1989) (citing Griswald v. Connecticut, 381 U.S. 479, 501, 85 S.Ct. 1678, 1690-91, 14 L.Ed.2d 510 (1965)). The Supreme Court repeatedly has stated that the Due Process Clause affords protections "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934). Thus, to determine whether the government's conduct in this case

violated the Due Process Clause, we begin with an inquiry into whether the government transgressed fundamental principles "traditionally protected by our society." Id. at 122, 54 S.Ct. at 338.

The government's conduct in this case is reminiscent of the infamous "Reward Statutes," enacted by the English Parliament in 1692, which promised monetary rewards--so called "blood money certificates"--to those who would provide information leading to the conviction of criminals. This perverse incentive structure was sharply criticized, and eventually abandoned, when, in 1754, it was discovered that a group of career informants had framed innocent individuals in order to collect the monetary reward and had provided false information which led to their executions. [FN2] In his Commentaries, Blackstone discusses a similar practice whereby convicted felons received monetary rewards and in some cases a pardon of all capital offenses for providing information leading to the conviction of another. According to Blackstone, this practice of so called "approvements" was eventually abandoned: "For the truth was, as Sir Matthew Hale observes, that more mischief hath arisen to good men by these kind of approvements, upon false and malicious accusations of desperate villains, than benefit to the public by the discovery and conviction of real offenders." William Blackstone, Commentaries on the Laws of England, vol. 4, p. 325 (1765). As these examples show, there is historical precedent, rooted in the common law, that supports the conclusion that the government's conduct

in this case "offend[s] the notions of justice of English-Speaking peoples even toward those charged with the most heinous offenses." Rochin, 342 U.S. at 169, 72 S.Ct. at 208 (citation omitted).

When, as in this case, the government gives a confidential informant the authority to develop the crime and his monetary reward depends on getting people convicted and on the magnitude of the drug transaction, the informant has too great an incentive to fabricate evidence and distort the truth. As the consequences of the "Reward Statutes" reveal, under these circumstances, there is too high a risk that a criminal defendant will be tried on the basis of false information and that the informant, although working for the government, will fail to disclose exculpatory facts.

The inherent danger of basing a paid informant's compensation on the rate of conviction and the quantity of the drugs is exacerbated when the government engages in "sting operations," which accord the government almost exclusive control over the information relating to the criminal activity. The danger is further exacerbated where the party with the financial incentive is the person orchestrating the crime. Unlike cases in which the paid informant merely provides information regarding ongoing criminal activities, in a "sting operation" of this kind the paid informant who structures the crime decides whether or not and at what time there will be witnesses present, which conversations will be recorded, whether to reveal any evidence of the defendant's reluctance to engage in the deal, and the like. Complete control over the "crime"

makes "sting operations" an efficient law enforcement technique. However, this same feature creates enormous potential for abuse. When, as here, "sting operations" are combined with contingency fees designed to maximize the conviction rate and the amount of drugs, it is likely that this potential will become actual.

*6 At a minimum, the Due Process Clause protects against the conviction of individuals on the basis of evidence that has such a high risk of being false. See, e.g., Mathews v. Eldridge, 424 U.S. 319, 347-49, 96 S.Ct. 893, 908-10, 47 L.Ed.2d 18 (1976); see also Goldberg v. Kelly, 397 U.S. 254, 270, 90 S.Ct. 1011, 1021-22, 25 L.Ed.2d 287 (1970). The likelihood that the government's actions will lead to the conviction of innocent people thus distinguishes this case from cases such as Simpson, 813 F.2d at 1466, and Penn, 647 F.2d at 880. The government's exploitation of intimate

relationships at issue in those cases may be offensive, but it does not undermine the reliability of the evidence obtained. Similarly, in all other cases in which courts have declined to apply the outrageous government conduct doctrine, there was not a high a risk of convicting innocent people on the basis of false information. See, e.g., Emmert, 829 F.2d 805 (no dismissal although the government intimidated college student and offered him large sum of money to provide cocaine for government agent); United States v. Smith, 924 F.2d 889 (9th Cir.1991) (not outrageous for government to get 18 year old drug rehabilitation patient to deal drugs); see also

United States v. Luttrell, 889 F.2d 806 (9th Cir.1989), amended, 923 F.2d 764 (en banc) (9th Cir.1991) (not outrageous conduct where government offered money to defendants to act illegally and resisted one defendant's attempt to withdraw from the plan); United States v. Sternberg, 803 F.2d 422, 430 (9th Cir.1986) (upholding conviction although informant had acted unlawfully); United States v. Wiley, 794 F.2d 514, 515 (9th Cir.1986) (permissible to introduce drugs in prison to identify distribution network).

The totality of the circumstances in this case makes clear that from the beginning to the end, this operation was conducted in an outrageous manner. The government brought a foreign national to the United States in order to create a crime. The confidential informant accepted a bribe from Crosthwaite and in return promised to get him an illegal visa and his car back. When Barruetta realized that Thomas was reluctant to participate in the drug sale, he offered Thomas cocaine and marijuana, which Thomas did not accept, as an incentive for engaging in the criminal activity. In fact, in light of Barruetta's direct incentives to get the defendants convicted, his testimony should have been considered inherently unreliable. When looking at this operation as a whole and at the behavior of the government agent, which ranged from improper conduct to outright criminal acts, it is undeniable that the government's conduct was outrageous.

The government's conduct here was at least as disturbing as it was in prior cases in which the courts reversed

convictions based on outrageous government conduct. See, e.g., Greene, 454 F.2d 783 (holding that outrageous conduct exists when the government manufactures the criminal activity and initiates contact with defendants); see also Twigg, 588 F.2d 373 (holding that it was outrageous conduct for the government to supply a hard to find an essential ingredient of the crime); Batres-Santolino, 521 F.Supp. 744 (holding that outrageous conduct exists when the government supplies all the drugs and defendants were not involved in drug-related crime until the government came on the scene); Lard, 734 F.2d at 1296 (stating that it was outrageous for the government to manufacture a crime).

*7 We cannot condone the government's actions in this case. Law enforcement agents are entrusted with awesome power. But with that power also comes a responsibility to guard against its abuse, a responsibility that the government in this case has abdicated. Were we to tolerate the government's conduct in this case, we would participate in that abuse. "However, this [c]ourt too has its responsibility." Rochin, 342 U.S. at 169, 72 S.Ct. at
208. As the Supreme Court stated in Russell, 411 U.S. at 431, 93 S.Ct. at 1642, the government's activities here were such that "due process principles should bar the government from invoking judicial processes to obtain a conviction". Accordingly, we reverse.

II. Solorio's Other Claims

1. Sufficiency of the Evidence

Solorio contends that there was insufficient evidence of his involvement with the conspiracy. In resolving this issue, we must determine "whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); see also United States v. Mares, 940 F.2d 455, 560 (9th Cir.1991).

[5] There is a factual dispute regarding the events that took place on December 3, 1992. According to the government, Barruetta, Crosthwaite, and the DEA Agents met at the "Big Bear" parking lot. Thomas, driving a motor home, arrived at an adjacent lot, referred to as the Long's drug store parking lot. Shortly thereafter, Solorio, who at the time lived in Escondido, arrived at the Long's parking lot driving a brown truck. The government contends that Solorio delivered the methamphetamine wrapped in newspaper to Thomas's motor home, then drove off, re-parking the brown truck in an adjacent lot. None of the officers, however, actually saw the person who delivered the drugs. Solorio eventually was arrested at the drug store after he re-parked the truck. Officer Perry Bryant, one of the arresting officers, testified that Solorio smelled of methamphetamine as did the brown truck he had been driving. At the time of arrest, Solorio was in possession of keys to the brown truck.

Agent Goldberg testified in front of the Grand Jury that he had seen Solorio deliver the drugs to Thomas, but at

trial he admitted that his Grand Jury testimony was false and that Officer Bryant's version of the facts was accurate. Officer Bryant testified that he saw someone get out of the brown truck carrying an object wrapped in newspaper, which he delivered to Thomas. Officer Bryant, however, testified that he could not actually see the object covered by the newspaper. Solorio contends that the newspapers that were found in the motor home belonged to Barruetta. Finally, the one fingerprint found on the box containing the drugs did not match Solorio's fingerprints.

It is undisputed that there was a conspiracy. Once the existence of a conspiracy has been established, "evidence of only a slight connection to the conspiracy" is sufficient to convict for participation in the conspiracy. United States v. Taylor, 802 F.2d 1108, 1116 (9th Cir.1986), cert. denied, 479 U.S. 1094, 107 S.Ct. 1309, 94 L.Ed.2d 164 (1987). Circumstantial evidence that Solorio was a member of the conspiracy is sufficient to support his conviction. United States v. Castro, 972 F.2d 1107, 1110 (9th Cir.1992), cert. denied, --- U.S. ----, 113 S.Ct. 1350, 122 L.Ed.2d 731 (1993). Viewed in the light most favorable to the prosecution, the circumstantial evidence presented here showed that Solorio drove the brown truck to the parking lot, transferred the drugs to the mobile home driven by Thomas, walked to the Long's Drug Store and was later arrested. At the time of arrest, Solorio smelled of methamphetamine and was carrying the keys to the brown truck. Based on this evidence, the jury reasonably could have concluded that he was the person

who delivered the drugs. Accordingly, we conclude that there was sufficient evidence that Solorio was a member of the conspiracy.

2. Prosecutorial Misconduct

*8 [6] Solorio makes several claims of prosecutorial misconduct.

According to Solorio, the prosecutor: (1) misrepresented the evidence; (2) instructed the jury on a legal theory on which the district court had refused to instruct the jury; (3) asked leading questions to most of the government's witnesses; (4) misrepresented his post-arrest statement and impermissibly referred to his post-arrest silence in her closing argument; (5) ignoring the court's admonitions, she repeatedly asked the defense's witnesses "argumentative and prejudicial" questions. The government maintains that there was no misconduct, and even if there were, that any error was harmless.

Solorio's trial attorney failed to object to the prosecutor's comments during closing argument. The defense's failure to raise a timely objection requires the appellate court to review the issue for plain error. See United States v. Tarazon, 989 F.2d 1045, 1051 (9th Cir.), cert. denied, --- U.S. ----, 114 S.Ct. 155, 126 L.Ed.2d 116 (1993) (citing cases); see also United States v. Berry, 627 F.2d 193, 199 (9th Cir.1980), cert. denied, 449 U.S. 1113, 101 S.Ct. 925, 66 L.Ed.2d 843 (1981). However, Solorio's other claims are based on statements and actions of the prosecutor to which his attorney did object and, thus, reversal is warranted if the misconduct, viewed in the context of the

whole trial, more likely than not prejudiced Solorio. See United States v. Sanchez-Robles, 927 F.2d 1070, 1077 (9th Cir.1987).

After carefully reviewing the record, we conclude that in light of the government's duty to ensure that criminal defendants receive a fair trial, the prosecutor probably acted improperly. However, "[e]ven if misconduct occurred, reversal is warranted only if it is more probable than not that the misconduct materially affected the verdict." United States v. Christophe, 833 F.2d 1296, 1301 (9th Cir.1987). With regard to Solorio's principal claim, we must apply an even more stringent standard of review because of defense counsel's failure to object to the prosecutor's comments. Accordingly, viewing the record as a whole, we conclude that any impropriety did not result in a miscarriage of justice. United States v. Olano, --- U.S. ----, ----, 113 S.Ct. 1770, 1779, 123 L.Ed.2d 508 (1993).

CONCLUSION

We hold that the government's conduct in this case was outrageous and a violation of due process. Therefore, we reverse Thomas's conviction. However, we affirm Solorio's conviction because he lacks standing to raise the outrageous government conduct claim and because his other claims lack merit.

REVERSED IN PART. AFFIRMED IN PART.

FN* The Honorable Samuel P. King, United States District Judge for the District of Hawaii, sitting by

designation.

FN1. The court in Bogart subsequently vacated the part of the opinion in which it affirmed one of the co-defendant's convictions on the ground that he lacked standing to raise the outrageous government conduct claim.

See United States v. Wingender, 790 F.2d 802 (9th Cir.1986).

FN2. See John H. Langbein, Shaping the Eighteenth-Century Criminal Trial:

A View from the Ryder Sources, 50 Univ. of Chicago L.Rev. 1, 106-14 (1983) (discussing the Macdaniel scandal and its repercussions for our concept of a criminal trial). See also Sir William Holdsworth, A History of the English Law, vol. 13, p. 395 (1952) (discussing the repeal of the reward statutes).

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Nos. 94-977 and 94-6963

In the Supreme Court of the United States

OCTOBER TERM, 1994

BRENDA TUCKER, PETITIONER

v.

UNITED STATES OF AMERICA

BARBARA MCDONALD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners were entitled to dismissal of the indictment on the theory that a government agent's inducement of their crime constituted outrageous government conduct.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	2
Statement	2
Argument	7
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Hampton v. *United States*, 425 U.S. 484 (1976)	5, 9
Jacobson v. *United States*, 112 S. Ct. 1535 (1992)	8
Rochin v. *California*, 342 U.S. 165 (1952)	8
Sherman v. *United States*, 356 U.S. 369 (1958)	8
Sorrells v. *United States*, 287 U.S. 435 (1932)	8
United States v. *Barger*, 931 F.2d 359 (6th Cir. 1991)	7
United States v. *Beverly*, 723 F.2d 11 (3d Cir. 1983)	10
United States v. *DeRewal*, 10 F.3d 100 (3d Cir. 1993), cert. denied, 114 S. Ct. 1544 (1994)	10
United States v. *Kelly*, 707 F.2d 1460 (D.C. Cir.), cert. denied, 464 U.S. 908 (1983)	10
United States v. *Lard*, 734 F.2d 1290 (8th Cir. 1984)	11
United States v. *Myers*, 692 F.2d 823 (2d Cir. 1982), cert. denied, 461 U.S. 961 (1983)	10
United States v. *Payner*, 447 U.S. 727 (1980)	5, 6, 9
United States v. *Russell*, 411 U.S. 423 (1973)	5, 8
United States v. *Solorio*, 37 F.3d 454 (1994), withdrawn, 43 F.2d 1334 (9th Cir. 1995)	11
United States v. *Twigg*, 588 F.2d 373 (3d Cir. 1978)	6, 10
Wisniewski v. *United States*, 353 U.S. 901 (1957)	12

Constitution and statute:

U.S. Const. Amend. V (Due Process Clause)	6, 7
7 U.S.C. 2024(b)(1)	2

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-23a)[1] is reported at 28 F.3d 1420.

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[1] Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 94-977.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1994. A petition for rehearing was denied on August 26, 1994. Pet. App. 1b-2b. The petition for a writ of certiorari in No. 94-6963 was filed on November 21, 1994. The petition for a writ of certiorari in No. 94-977 was filed on November 23, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In a five-count indictment returned in the United States District Court for the Western District of Tennessee, petitioners were charged with purchasing, and aiding and abetting the purchase of, food stamps, in violation of 7 U.S.C. 2024(b)(1).[2] Petitioners moved to dismiss the indictment, claiming that the government's conduct in inducing them to commit their crimes violated due process. The district court, accepting the recommendation of a magistrate judge, granted the motion. The government appealed, and the court of appeals reversed and remanded for trial. Pet. App. 1a-23a.

1. Petitioners' indictment arose out of a "reverse sting" operation, in which an agent of the Department of Agriculture, Clifford White, retained Linda Hancock to offer to sell food stamps below face value. Agent White furnished Hancock food stamps and instructed her to sell them. Hancock was reimbursed for her mileage costs and was paid by being permitted to keep half the money collected from her sales of food stamps. Hancock was

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[2] Both petitioners were charged in Count One of the indictment. Counts Two, Three, and Four charged petitioner McDonald only, and Count Five charged petitioner Tucker alone. C.A. App. 17-21.

told to find people who were willing to buy food stamps below face value and to record her conversations with them. She was not told whom to approach, but she was instructed not to compel anyone to buy food stamps. Pet. App. 2a, 2c-3c.

Petitioner Tucker owned and operated a beauty salon in Memphis, and petitioner McDonald was her employee. Tucker and Linda Hancock were personal friends. Pet. App. 3c. In November 1990, Hancock contacted Tucker at the beauty salon and told her that she was in such dire financial need that her children would not have a proper Christmas. Hancock came to the beauty salon dressed in a manner that suggested she was in financial distress.[3] Hancock offered to sell Tucker food stamps at half their face value, and Tucker agreed. Tucker purchased food stamps from Hancock on two separate occasions; she also put Hancock in touch with McDonald and other salon employees and customers. *Id.* at 3c-4c; C.A. App. 128-129. Hancock told McDonald that Hancock had been sick and that she had to sell some food stamps in order to provide for her children's Christmas. Pet. App. 4c; C.A. App. 141. McDonald also purchased food stamps from Hancock. Pet. App. 4c.[4]

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[3] As the court of appeals noted (Pet. App. 4a n.1), the government vigorously disputed several of the magistrate judge's findings, described in the text, regarding practices employed by Hancock to ferret out persons willing to buy food stamps. For example, Hancock denied that she dressed in a manner suggesting she was in financial need and said she did not represent to petitioner Tucker that she was having financial difficulties. *Id.* at 3c-4c. The magistrate judge resolved the factual disputes based on credibility judgments, and the court of appeals found no clear error in those findings. *Id.* at 4a n.1.

[4] Hancock said she approached Tucker because she knew that Tucker had previously been convicted for shoplifting and thought

2. The magistrate judge recommended that the indictment be dismissed for outrageous government conduct. He noted that petitioners would not likely succeed with an entrapment defense because of their willingness to participate in the food stamps sales, but he thought the case was "one that should be dismissed without regard to [petitioners'] ability to mount an entrapment defense," because the government's conduct went so "far beyond the bounds of propriety" as to constitute a violation of due process. Pet. App. 7c-8c.

The district court accepted the magistrate judge's recommendation and dismissed the indictment. The court agreed that the facts made it doubtful that either defendant would be able to present a credible entrapment defense, but it concluded, as had the magistrate, that the totality of the facts in this case crossed the boundary of due process. Pet. App. 1e-4e. The court remarked (*id.* at 3e):

> I don't think we are at a point in our criminal history where the government needs to lower itself into targeting sympathetic ploys on citizens that are not otherwise suspected of engaging in criminal conduct * * *.

3. On the government's appeal, the court of appeals reversed and remanded for trial. The court of appeals concluded that, as a matter of law, a defendant could not claim a violation of due process based solely on the

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that she had also been involved in stolen credit cards and fur coats; the magistrate, however, noted that the shoplifting conviction occurred 16 years before and that Tucker's denial of any involvement in stolen credit cards or merchandise was credible. There was no evidence that either Tucker or McDonald had ever previously been involved in food stamps sales. Pet. App. 5c-6c; C.A. App. 97-102.

theory that his criminal behavior was induced by the government and that the government's conduct was objectively outrageous. Rather, when a defendant attacks the manner in which the government induced him to commit a crime, he is "limited to the defense of entrapment and its key element of predisposition." Pet. App. 20a-21a.

The court of appeals began by noting that this Court had never accepted the so-called "objective" entrapment defense, which would focus solely on the government's conduct and would not consider whether the defendant was subjectively predisposed to commit the offense. Although this Court stated in *United States* v. *Russell*, 411 U.S. 423, 431-432 (1973), that outrageous government conduct might be a bar to prosecution in a sufficiently extreme and shocking case, the court noted that that suggestion was made in dicta. The court of appeals further observed that the plurality in *Hampton* v. *United States*, 425 U.S. 484 (1976), had repudiated any defense based on outrageous conduct, and while Justice Powell's concurring opinion in *Hampton* continued to leave open the possibility of such a defense, his opinion for the Court in *United States* v. *Payner*, 447 U.S. 727 (1980), appeared to abandon that possibility. Pet. App. 7a-9a & n.3.

The court of appeals then stated that many of its prior cases had assumed the existence of a due process defense based on outrageous government conduct. None of those cases, however, had reversed a conviction based on that defense. Similarly, the court of appeals noted, other courts of appeals had often cited *Russell* for the possibility that a prosecution could be barred based on outrageous conduct, but had rejected the defense on the facts of each case. The court of appeals found only one case in which a court had actually barred a prosecution

on that basis, *United States* v. *Twigg*, 588 F.2d 373 (3d Cir. 1978), but it observed that *Twigg* had been disavowed by the court that had decided it. Pet. App. 11a-12a.

Finding no authority requiring it to recognize the due process defense of outrageous government conduct, the court of appeals articulated three reasons for concluding that such a defense should not be recognized. First, the court reasoned, government conduct that induces a defendant to commit a crime, even if considered "outrageous," does not violate a defendant's due process rights, because the basis for the defense of entrapment has been held to lie in congressional intent, not in the Due Process Clause. The court explained that if Congress could eliminate the entrapment defense even for defendants who were not predisposed to commit a crime, the Constitution does not require an outrageous-conduct defense for defendants who were predisposed to commit a crime. Pet. App. 16a-17a.

Second, the court of appeals found no authority to dismiss an indictment in the absence of any specific violation of a defendant's due process rights. The court noted that this Court's decision in *United States* v. *Payner*, 447 U.S. 727, 737 n.9 (1980), had rejected a similar attempt to dismiss an indictment based solely on an " 'objective' assessment of the government's conduct." Pet. App. 17a-18a.

Finally, the court of appeals stated that recognition of an outrageous conduct defense would violate separation of powers principles. The court noted that the Executive Branch is principally responsible for regulating the conduct of investigations, and that, through the entrapment defense, Congress "has implicitly curbed the Executive Branch" from engaging in conduct that induces a defendant to commit a crime that he is not predisposed to commit. Pet. App. 19a. The court of

appeals concluded that the Judiciary should not inject itself further into the role of reviewing police practices by invoking the Due Process Clause. Rather, the jury, acting as factfinder in cases of alleged entrapment, "operates as the ultimate check on abuses of executive power." *Id.* at 18a-20a.

The court of appeals therefore held that "a defendant whose defense sounds in inducement is, by congressional intent and Supreme Court precedent, limited to the defense of entrapment and its key element of predisposition." Pet. App. 20a. The limitations on that defense, the court determined, cannot be circumvented by an outrageous conduct defense under the Due Process Clause.[5] *Ibid.*

Judge Martin concurred in the result. In his view, the court was bound by prior Sixth Circuit precedent to recognize the existence of an outrageous government conduct defense. He concurred, however, because he did not believe that the government's conduct in this case, measured by the factors set forth in *United States* v. *Barger*, 931 F.2d 359, 363-364 (6th Cir. 1991), was outrageous. Pet. App. 21a-23a.

ARGUMENT

Petitioners contend (94-977 Pet. 11-29; 94-6963 Pet. 12-26) that the court of appeals erred in rejecting an outrageous government conduct defense based on the conduct of government agents in inducing the defendant to commit a crime. They argue that the decision below conflicts with decisions from the Third and Ninth Circuits in which those courts dismissed indictments for outrageous government conduct, and with the analysis of

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[5] The court remanded for a trial, at which the issue of entrapment would be determined by the jury. Pet. App. 21a.

cases in other circuits. Petitioners' claim does not merit this Court's review. Although the courts of appeals have expressed different views on whether any outrageous government conduct defense exists, the facts of this case would not fall within the extremely narrow category of cases in which the courts have said such a defense might be appropriate.

1. This Court has never held that the government's employment of undercover agents, or the use of deception by them, gives rise to a due process defense. While the Court has permitted defendants to raise an entrapment defense, under which a defendant who lacks the predisposition to engage in criminal conduct may avoid conviction when the government has induced him to commit the crime, see *Jacobson* v. *United States*, 112 S. Ct. 1535, 1540 (1992), the Court has repeatedly tied that defense to the defendant's lack of subjective predisposition to violate the law. The Court has rejected the so-called "objective" theory of that defense, which would focus only on the government's conduct. *United States* v. *Russell*, 411 U.S. 423, 433-434 (1973); *Sherman* v. *United States*, 356 U.S. 369, 376-377 (1958); *Sorrells* v. *United States*, 287 U.S. 435, 451 (1932). As the Court put it in *Russell*, "the defense of entrapment enunciated in [*Sorrells* and *Sherman*] was not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve." 411 U.S. at 435.

In *Russell*, the Court left open the possibility that conduct of law enforcement officials may be "so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction." *Russell*, 411 U.S. at 431-432. The *Russell* Court's citation (*id.* at 432) to the "stomach pumping" case, *Rochin* v. *California*, 342 U.S. 165 (1952), however,

implied a due process concern with conduct involving police violence or brutality. The Court's subsequent decisions indicate that, if any outrageous government conduct defense exists as to investigatory tactics, it is exceedingly narrow in scope. See *Hampton* v. *United States*, 425 U.S. 484 (1976); *United States* v. *Payner*, 447 U.S. 727, 737 n.9 (1980).

Indeed, in *Hampton*, the plurality would have rejected any due process defense when a defendant is predisposed to engage in the crime. 425 U.S. at 488-491 (plurality opinion). Justice Powell, joined by Justice Blackmun, concurred in the judgment and did not wish to foreclose all possibility of a due process defense, but underscored that "the cases, if any, in which proof of predisposition is not dispositive will be rare," and that claims of "outrageousness" would be particularly unlikely to succeed when the challenged police practice involves the use of undercover agents to combat contraband offenses. *Id.* at 495-496 & n.7. And in *Payner*, the Court cast further doubt on a due process defense based on purportedly outrageous conduct. 447 U.S. at 737 n.9. In light of the reasoning of those cases, there is significant support for the court of appeals' conclusion that a defense of outrageous conduct cannot be predicated solely on the way in which a defendant was induced to commit a crime in an undercover investigation.

2. Petitioners contend that the court of appeals' rejection of an outrageous conduct defense conflicts with the decisions of other courts of appeals. 94-977 Pet. 13-22; 94-6963 Pet. 17-21. It is true that the court in this case went further than other courts of appeals in precluding an outrageous government conduct defense that relies solely on an objective attack on the government's inducement of a crime. But the court's holding, on the facts of this case, is consistent with the

results reached by other courts of appeals. Although other courts have recognized an outrageous conduct defense in theory, no court of appeals has held that a predisposed defendant may establish a violation of due process merely because he was induced to commit the crime by an undercover agent. Rather, courts have generally reserved an outrageous conduct defense for cases involving far more egregious conduct. See *United States* v. *Kelly*, 707 F.2d 1460, 1461, 1476 (D.C. Cir.) (opinion of R.B. Ginsburg, J., for the court) (suggesting that coercion, violence, or brutality is required), cert. denied, 464 U.S. 908 (1983); *United States* v. *Myers*, 692 F.2d 823, 836-843 (2d Cir. 1982) (same), cert. denied, 461 U.S. 961 (1983). And, contrary to petitioners' contention, the decision below does not conflict with the result reached by any other court of appeals.

In *United States* v. *Twigg*, 588 F.2d 373 (1978), a divided panel of the Third Circuit reversed convictions where government agents had supplied the defendants—who had previously been "lawfully and peacefully minding [their] own affairs," *id.* at 381; see also *id.* at 382—with the chemicals, laboratory, and expertise necessary for them to manufacture methamphetamine. As the Third Circuit recently noted, however, it has never applied *Twigg* since that case was decided, see *United States* v. *DeRewal*, 10 F.3d 100, 105 n. 3 (1993), cert. denied, 114 S. Ct. 1544 (1994), and that court also has suggested that *Twigg* was wrongly decided. See *United States* v. *Beverly*, 723 F.2d 11, 12 (1983). Moreover, even were *Twigg* still authoritative, it is distinguishable. Unlike the government agents in *Twigg*, Hancock merely presented petitioners with an opportunity to buy food stamps and allegedly used deceptive tactics in her offer of sales; petitioners showed a ready willingness to make the illegal purchases, and there was no need for Hancock

to provide extraordinary means for committing the crimes.[6]

Nor are petitioners aided by *United States* v. *Solorio*, 37 F.3d 454 (1994), withdrawn, 43 F.3d 1334 (9th Cir. 1995) (see Pet. App. 1f-25f). That case turned on the panel's perception (which the government has disputed in a rehearing petition that remains pending) that a drug informant "was paid a fee contingent on conviction." 37 F.3d at 458; see also *id.* at 459, 460 (reemphasizing that payments were contingent on "getting people convicted"). The panel deemed such a contingency fee outrageous because it provides "too great an incentive for informants to fabricate evidence and to maximize the amount of drugs involved." *Id.* at 458. In this case, however, Hancock, the undercover agent, was paid by being permitted to keep half the proceeds of her food stamps sales. There was no evidence that her payments were contingent on obtaining convictions, and petitioners' claim was not predicated on the theory that the payment arrangements rendered the agent's testimony unreliable. In any event, the panel that decided *Solorio* has ordered the publication of its opinion withheld pending further order of the court, and the government's petition for rehearing, and suggestion for rehearing en

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[6] Petitioner Tucker also puts some reliance (94-977 Pet. 24-25) on *United States* v. *Lard*, 734 F.2d 1290 (8th Cir. 1984), but in that case the court of appeals reversed on traditional entrapment grounds, finding that the facts failed to show that the defendant was predisposed to commit the crime. The court went on to remark that the conduct of government agents in that case "approached" the kind of outrageous government conduct that had led the court in *Twigg* to reverse on due process grounds. *Id.* at 1296-1297. The court's due process comments were unnecessary to its decision, since it had already found entrapment as a matter of law.

banc, remains pending. Thus, the decision in *Solorio* may yet be modified or reconsidered by the court of appeals en banc.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1995

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[7] Petitioner McDonald also complains (94-6963 Pet. 27-31) that the court of appeals erred in holding that it was not bound by its prior cases assuming the existence of an outrageous government conduct defense on the ground that the comments in each of those cases were dicta. Pet. App. 11a. That contention does not merit review by this Court. Whatever conflict may exist among Sixth Circuit precedents is a matter for resolution by the court of appeals. *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

(3)

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-977

BRENDA TUCKER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 94-6963

BARBARA MCDONALD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred in reversing the order of the district court dismissing the indictment in this case.

1. On September 22, 1992, petitioners were indicted by a grand jury sitting in the United States District Court for the Western District of Tennessee. They were charged in five counts with purchasing, and aiding and abetting the purchase of, food stamps, in violation of 7 U.S.C. 2024(b)(1). The indictment arose out of a "reverse sting" operation in which the Department of Agriculture hired Linda Hancock to catch people who buy food stamps below face value, abusing the food stamp system. In November 1990, Hancock sold food stamps to petitioners after she claimed she was in dire financial need. 94-977 Pet. App. 1a-3a.

On June 2, 1993, accepting the recommendation of a magistrate, the district court granted petitioners' motion to dismiss the indictment on the ground that the government's conduct in employing Hancock to induce criminal activity in persons who were not otherwise suspected of engaging in crimes was so outrageous that it violated their due process rights. 94-977 Pet. App. 1a-2a.

The court of appeals reversed. 94-977 Pet. App. 1a-23a. The court held that "outrageous" government conduct that induces a defendant to commit a crime does not violate due process; that the district court lacks authority to dismiss an indictment on due process grounds; and that such a remedy would violate the constitutional separation of powers. The court further concluded that the question whether petitioners were entrapped must be resolved by the jury. *Id.* at 6a-21a.

2. Petitioners contend (94-977 Pet. 11-29; 94-9463 Pet. 12-26) that due process may bar a criminal prosecution because of outrageous conduct by government agents. Petitioner McDonald also contends (94-9463 Pet. 27-31) that the court of appeals erred in concluding that the language in its prior cases recognizing a due process

defense based upon outrageous government conduct was mere dicta. Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motion to dismiss. If petitioners are acquitted following a trial on the merits, their contentions will be moot. If, on the other hand, petitioners are convicted and their convictions are affirmed on appeal, they will then be able to present their contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of final judgments of conviction. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DREW S. DAYS, III
Solicitor General

DECEMBER 1994

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* Because this case is interlocutory, we are not responding on the merits to the questions presented by the petitions. We will file a response on the merits if the Court requests.